

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

United States Court of Appeals
For the District of Columbia Circuit

FILED MAY 24 1995

**Division for the Purpose of
Appointing Independent Counsels**

CLERK

Ethics in Government Act of 1978, As Amended

In re: Henry G. Cisneros

Division No. 95-1

Order Appointing Independent Counsel

**Before: SENTELLE, Presiding, BUTNER and FAX,
Senior Circuit Judges**

Upon consideration of the application of the Attorney General pursuant to 28 U.S.C. § 592(c)(1) for the appointment of an independent counsel with authority to exercise all the power, authority and obligations set forth in 28 U.S.C. § 594, to investigate whether Henry G. Cisneros, Secretary of Housing and Urban Development, committed a violation of federal criminal law when he made false statements to the Federal Bureau of Investigation ("FBI") during his background investigation, and to determine whether prosecution is warranted; it is

ORDERED by the Court in accordance with the authority vested in it by 28 U.S.C. § 593(b) that David M. Barrett, Esquire, of the Indiana and District of Columbia bars, with offices at Barrett & Schuler, Suite 100, 2626 Pennsylvania Ave., N.W., Washington, D.C. 20037, be and hereby is appointed Independent Counsel with full power, independent authority, and jurisdiction to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether Henry G. Cisneros, Secretary of Housing and Urban Development, committed a violation of any federal criminal law, other than a Class B or C

misdemeanor or infraction, by making false statements with respect to his past payments to Linda Medlar to the Federal Bureau of Investigation during the course of his background investigation or conspiring with others to do so.

The Independent Counsel shall have jurisdiction and authority to investigate other related allegations or evidence of violation of federal criminal law, other than a Class B or C misdemeanor or infraction, by any organization or individual as necessary to resolve the matter described above.

The Independent Counsel shall have jurisdiction and authority to investigate any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false statement or testimony in violation of federal criminal law, in connection with or arising out of the investigation of the matters described above.

The Independent Counsel shall have jurisdiction and authority to seek indictments and to prosecute any persons or entities involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

The Independent Counsel shall have all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994. It is

FURTHER ORDERED by the Court that the Independent Counsel, as authorized by 28 U.S.C. § 594, shall have prosecutorial

jurisdiction to fully investigate and prosecute the subject matter with respect to which the Attorney General requested the appointment of independent counsel, as hereinbefore set forth, and all matters and individuals whose acts may be related to that subject matter, inclusive of authority to investigate and prosecute federal crimes (other than those classified as Class B or C misdemeanors or infractions) that may arise out of the above described matter, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.

It further appearing to the Court in light of the Attorney General's motion heretofore made for the authorization of the disclosure of her application for this appointment pursuant to 28 U.S.C. § 592(e) and of the ongoing public interest in this matter, that it is in the best interests of justice for the identity and prosecutorial jurisdiction of the Independent Counsel to be disclosed,

IT IS SO ORDERED.

Per Curiam:
For the Court:

Mark J. Langer, Clerk

by 

Marilyn R. Sargent
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the District of Columbia Circuit

Division for the Purpose of
Appointing Independent Counsels

FILED MAR 18 1997

Special Division

Ethics in Government Act of 1978, As Amended

In re: Henry G. Cisneros

Division No. 95-1

Under Seal

Order Expanding and Amending
Jurisdiction of Independent Counsel

Before: SENTELLE, *Presiding Judge*, BUTZNER and FAY,
Senior Circuit Judges

Upon consideration of the application of the Attorney General pursuant to 28 U.S.C. § 593(c)(1) that the jurisdiction conferred by the May 24, 1995, Order of this Court upon Independent Counsel David M. Barrett be expanded to include whether investigation and prosecution of any tax violations arising from federal income tax returns filed for tax year 1992 by Henry G. Cisneros, former Secretary of the United States department of Housing and Urban Development is warranted, it is hereby

ORDERED by the Court in accordance with the authority vested in it by 28 U.S.C. § 593(b) that Independent Counsel David M. Barrett, Esquire, of the District of Columbia bar, shall continue to have the full power, independent authority and jurisdiction including, but not limited to, the power, obligations and authority, set forth in 28 U.S.C. § 594, as conferred upon him by the May 24, 1995, Order of this court, to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994, whether Henry G. Cisneros committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by making false

statements with respect to his past payments to Linda Medlar to the Federal Bureau of Investigation during the course of his background investigation or conspiring with others to do so. It is

FURTHER ORDERED by the Court in accordance with the authority vested in it by 28 U.S.C. §§ 593(b) and (c)(1) that Independent Counsel David M. Barrett shall have jurisdiction and authority to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether Henry G. Cisneros, former Secretary of the United States Department of Housing and Urban Development, or any person or entity acting in concert with him, has committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, arising from or relating to the filing or preparation of his federal income tax returns for tax year 1992 or conspiring with others to do so.

The Independent Counsel shall have the jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law by Henry G. Cisneros or any person or entity, other than a Class B or C misdemeanor or infraction, developed during the Independent Counsel's investigation of the matters referred to above, and arising out of such investigation.

The Independent Counsel shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a class B or C misdemeanor or infraction, by any individual or entity as necessary to resolve the matter described above.

The Independent Counsel shall have jurisdiction and authority to investigate any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false statement or testimony in violation of federal criminal law, that may arise out of investigation of the matters describe above.

The Independent Counsel shall have jurisdiction and authority to seek indictments and to prosecute any persons or entities involved in any of the matters described above, who are reasonably

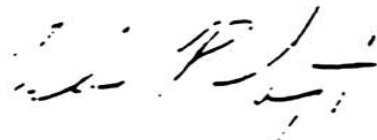
believed to have committed a violation of any federal law, other than a Class B or C misdemeanor or infraction, arising out of such matters, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

Per Curiam:

For the Court:

Mark J. Langer, Clerk

by

A handwritten signature in black ink, appearing to read "M. R. Sargent", written over a horizontal line.

Marilyn R. Sargent
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED MAR 26 1997

Division for the Purpose of
Appointing Independent Counsels

Special Division

Ethics in Government Act of 1978, As Amended

In re: Henry G. Cisneros

Division No. 95-1

Under Seal

Amending Order

Before: SENTELLE, *Presiding Judge*, BUTZNER and FAY, *Senior Circuit Judges*

Upon consideration of the order filed March 18, 1997, expanding and amending the jurisdiction of Independent Counsel Barrett, it is

ORDERED, on the Court's own motion, that the order be amended by adding after the final paragraph:

The Independent Counsel shall have all the powers and authority provided by the Independent Counsel Reauthorization Act of 1994. It is


FURTHER ORDERED by the Court that the Independent Counsel, as authorized by 28 U.S.C. § 594, shall have prosecutorial jurisdiction to fully investigate and prosecute the subject matters with respect to which the Attorney General requested the appointment of independent counsel, and the expansion of such independent counsel's jurisdiction, as hereinbefore set forth, and all matters and persons and entities whose acts may be related to those subject matters, inclusive of authority to investigate and prosecute federal crimes (other than those classified as

Class B or C misdemeanors or infractions) that may arise out of the above described matters, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.

IT IS SO ORDERED.

Per Curiam:
For the Court:
Mark J. Langer, Clerk

by



Marilyn R. Sargent
Chief Deputy Clerk

Lubbock Indictment Summary, Case No. 5:97-CR-074-C

Count(s)	Defendants Charged	Statutory Offense	Acts Alleged
1	Medlar, Patsy Wooten, Allen Wooten	18 U.S.C. § 371	Conspired to commit bank fraud, to make false statements to a bank, to launder monetary instruments, and to engage in monetary transactions in property derived from specified unlawful activity.
2	Medlar, Patsy Wooten, Allen Wooten	18 U.S.C. § 1344, 18 U.S.C. § 2	Knowingly executed and attempted to execute a scheme and artifice to defraud a financial institution by representing that the Wootens were the purchasers and future occupants of the Lubbock house in order to obtain a mortgage loan.

Count(s)	Defendants Charged	Statutory Offense	Acts Alleged
3	Medlar, Patsy Wooten, Allen Wooten	18 U.S.C. § 1014, 18 U.S.C. § 2	Signed a "Customer Notice" form falsely stating that Wootens intended to occupy property as their primary residence.
4	Medlar, Patsy Wooten, Allen Wooten	18 U.S.C. § 1014, 18 U.S.C. § 2	Made false representations on "Request for Verification of Employment" form.
5	Medlar, Patsy Wooten, Allen Wooten	18 U.S.C. § 1014, 18 U.S.C. § 2	Made false representations on "Request for Verification of Employment" form.
6	Medlar, Patsy Wooten, Allen Wooten	18 U.S.C. § 1014, 18 U.S.C. § 2	Signed "Uniform Residential Loan Application" containing misrepresentations.
7	Medlar, Patsy Wooten, Allen Wooten	18 U.S.C. § 1014, 18 U.S.C. § 2	Signed "Deed of Trust" containing misrepresentations.
8	Medlar, Patsy Wooten, Allen Wooten	18 U.S.C. § 1014, 18 U.S.C. § 2	Signed "Owner Occupancy Affidavit" containing misrepresentations.

Count(s)	Defendants Charged	Statutory Offense	Acts Alleged
9	Medlar, Patsy Wooten, Allen Wooten	18 U.S.C. § 1014, 18 U.S.C. § 2	Signed and initialed "Affidavit and Agreement" containing misrepresentations.
10	Medlar, Patsy Wooten, Allen Wooten	18 U.S.C. § 1956, 18 U.S.C. § 2	Caused a \$74,292.16 check to be transferred from The Plains National Bank to Stewart Title Co.
11	Medlar, Patsy Wooten, Allen Wooten	18 U.S.C. § 1956, 18 U.S.C. § 2	Caused a \$900 check made payable to "Patsy Wooten" and drawn on Norwest Bank account to be transferred to Patsy Wooten.
12	Medlar, Patsy Wooten, Allen Wooten	18 U.S.C. § 1956, 18 U.S.C. § 2	Caused a \$450 check made payable to "Patsy Wooten" and drawn on Norwest Bank account to be transferred to Patsy Wooten.

Count(s)	Defendants Charged	Statutory Offense	Acts Alleged
13	Medlar, Patsy Wooten, Allen Wooten	18 U.S.C. § 1956, 18 U.S.C. § 2	Caused a \$180 check made payable to "Patsy Wooten" and drawn on Norwest Bank account to be transferred to Patsy Wooten.
14	Medlar, Patsy Wooten, Allen Wooten	18 U.S.C. § 1956, 18 U.S.C. § 2	Caused a \$90 check made payable to "Patsy Wooten" and drawn on Norwest Bank account to be transferred to Patsy Wooten.
15	Medlar, Patsy Wooten, Allen Wooten	18 U.S.C. § 1956, 18 U.S.C. § 2	Caused a \$660 check made payable to "Patsy Wooten" and drawn on Norwest bank account to be transferred to Patsy Wooten.

Count(s)	Defendants Charged	Statutory Offense	Acts Alleged
16	Medlar, Patsy Wooten, Allen Wooten	18 U.S.C. § 1956, 18 U.S.C. § 2	Caused a \$79,950.35 check made payable to "Fleet Mortgage Group" and drawn on American State Bank escrow account to be transferred by Lubbock Abstract & Title Co to Fleet Mortgage Group.
17	Medlar, Patsy Wooten, Allen Wooten	18 U.S.C. § 1956, 18 U.S.C. § 2	Caused a \$6,182.14 check made payable to "Allen Wooten and wife Patsy Wooten" and drawn on American State Bank escrow account to be transferred by Lubbock Abstract & Title Co. to Allen and patsy Wooten.
18	Medlar, Patsy Wooten, Allen Wooten	18 U.S.C. § 1957, 18 U.S.C. § 2	Caused a \$74,292.16 check to be transferred from The Plains National Bank of Lubbock to Stewart Title Co. of Lubbock.

Count(s)	Defendants Charged	Statutory Offense	Acts Alleged
19	Medlar, Patsy Wooten, Allen Wooten	18 U.S.C. § 1957, 18 U.S.C. § 2	Caused a \$79,950.35 check made payable to "Fleet Mortgage Group" and drawn on American State Bank escrow account to be transferred by Lubbock Abstract & Title Co. to Fleet Mortgage Group.
20	Medlar	18 U.S.C. § 1503	Falsely stated in her 4/26/96 FBI interview that she furnished original tapes to the IRS on May 31, 1995.
21	Medlar	18 U.S.C. § 1503	Falsely stated in her 4/26/96 FBI interview that she rented a safety deposit box in July or August 1994.
22	Medlar	18 U.S.C. § 1503	Withheld from Grand Jury the recording devices she used to record her conversations with Cisneros and others.

Count(s)	Defendants Charged	Statutory Offense	Acts Alleged
23	Medlar	18 U.S.C. § 1001	Concealed and covered up the fact that she had not turned over all records requested by OIC.
24	Medlar	18 U.S.C. § 1001	Concealed and covered up the fact that she first rented safety deposit box on or about September 16, 1993.
25	Medlar	18 U.S.C. § 1001	Concealed and covered up the fact that she furnished copies of the tapes, not originals, to the IRS on May 31, 1995.
26	Medlar	18 U.S.C. § 1001	Concealed and covered up the fact that she spoke to Shirley Thomas on or about April 12, 1996.

Count(s)	Defendants Charged	Statutory Offense	Acts Alleged
27	Medlar	18 U.S.C. § 1001	Concealed and covered up the fact that she had in her possession, custody, and control the devices she used to record her conversations with Cisneros and others.
28	Medlar	18 U.S.C. § 1001	Falsely stated in her May 31, 1995 IRS interview that she was late for the interview because she stopped to retrieve tapes from safety deposit box.

District of Columbia Indictment Summary, Case No. 97-CR-485(SS)

Count	Defendants Charged	Statutory Offense Charged	Acts Alleged
1	Cisneros, Medlar, Arce-Garcia, Rosales	18 U.S.C. § 371	Conspired to impede the Senate in passing on and the FBI in investigating the Cisneros nomination; conspiring to commit various criminal offenses to do so.
2	Cisneros	18 U.S.C. § 1001	Falsely stated on Standard Form SF-86 that there was no basis upon which he could be subjected to coercion or blackmail.
3	Cisneros	18 U.S.C. § 1001	Falsely stated in 12/30/92 FBI interview that his answers on Standard Form were accurate and correct.
4	Cisneros	18 U.S.C. § 1001	Falsely stated in 12/30/92 FBI interview that he was unaware of any basis upon which he could be subjected to coercion or blackmail.
5	Cisneros	18 U.S.C. § 1001	Falsely stated in 12/30/92 FBI interview that he had "been with" one woman, other than Medlar, during his marriage to his wife.
6	Cisneros	18 U.S.C. § 1001	Concealed in 12/30/92 FBI interview that he was making payments to Medlar.
7	Cisneros	18 U.S.C. § 1001	Concealed in 12/30/92 FBI interview that Medlar threatened to disclose publicly that he was making payments to her.

Count	Defendants Charged	Statutory Offense Charged	Acts Alleged
8	Cisneros	18 U.S.C. § 1001	Concealed in 12/30/92 FBI interview that he had structured payments to Medlar to avoid making a Currency Transaction Report.
9	Cisneros	18 U.S.C. § 1001	Concealed in 12/30/92 FBI interview that he had not filed informational Gift Tax Returns with the IRS for payments to Medlar in excess of \$10,000 per year.
10	Cisneros	18 U.S.C. § 1001	Falsely stated in 1/7/93 FBI interview that his payments to Medlar were not "hush money."
11	Cisneros	18 U.S.C. § 1001	Falsely stated in 1/7/93 FBI interview that he was not "currently" making payments to Medlar.
12	Cisneros	18 U.S.C. § 1001	Falsely stated in 1/7/93 FBI interview that the single highest payment he had made to Medlar was about \$2500.
13	Cisneros	18 U.S.C. § 1001	Falsely stated in 1/7/93 FBI interview that his total payments to Medlar had never exceeded \$10,000 per year.
14	Cisneros	18 U.S.C. § 1001	Falsely stated in 1/7/93 FBI interview that Medlar had never threatened, coerced, or tried to obtain money from him.

Count	Defendants Charged	Statutory Offense Charged	Acts Alleged
15	Cisneros	18 U.S.C. § 1001	Falsely stated in 1/7/93 FBI interview that he had not had substantial at length conversations with Medlar since early 1991.
16	Cisneros	18 U.S.C. § 1001	Falsely stated in 1/7/93 FBI interview that he had had only one extramarital relationship, other than with Medlar, during his marriage to his wife.
17	Cisneros	18 U.S.C. § 1001	Failed to disclose in 1/7/93 FBI interview that he had directed defendants Arce-Garcia and Rosales not to inform the FBI that he was making payments to Medlar, or the amount of such payments.
18	Cisneros	18 U.S.C. § 1505	Corruptly influenced, obstructed, and impeded proceeding of DOJ Personnel Security Office in deciding whether to issue him security clearance, by making false statements.
19	Rosales	18 U.S.C. § 1001	Falsely stated to IRS that he did not know of Cisneros's payments to Medlar before he came to D.C.
20	Rosales	18 U.S.C. § 1001	Falsely stated to FBI that he did not know of Cisneros's payments to Medlar while he was employed at Cisneros Communications.

Count	Defendants Charged	Statutory Offense Charged	Acts Alleged
21	Medlar	18 U.S.C. § 1001	Falsely stated to FBI that she had provided to the IRS the original tapes of her recorded conversations with Cisneros.

AFFIDAVIT

Affidavit of Federal Bureau of Investigation ("FBI") Special Agent T.J. Roberts in support of: (1) Request for an Expansion of Prosecutorial Jurisdiction under 28 U.S.C. § 593(c); and (2) Application for the Referral of Related Matter under 28 U.S.C. § 594(e).

I, T.J. Roberts, being duly sworn, depose and say:

A. I, the affiant, am a Special Agent with the FBI. I, the affiant, am the FBI Case Agent assigned full-time to the Office of Independent Counsel ("OIC") - David M. Barrett, which is currently investigating Henry G. Cisneros, former Secretary of Housing and Urban Development ("HUD").

B. I, the affiant, have been a FBI agent for approximately eight years and a Certified Public Accountant ("CPA") for approximately nine years. I have received formal training as a Federal Agent at the FBI Academy in Quantico, Virginia. During my tenure as a Criminal Investigator, I have been involved in, among other things, the investigation and prosecution of various violations of the Federal Criminal Code, principally, white collar violations involving bank fraud, public corruption and tax fraud.

FACTUAL BACKGROUND

C. The affiant has personal knowledge of the facts and circumstances surrounding the allegations described in the following paragraphs as a result of my involvement in this investigation:

1. On December 17, 1992, President-Elect Clinton nominated Henry G. Cisneros to become HUD Secretary, a position which requires United States Senate confirmation. As part of the confirmation process, the FBI Director ordered a Level 1 background investigation be conducted. A Level 1 background investigation is required for all cabinet-level positions and is the highest type of background investigation conducted by the FBI. Accordingly, during late December, 1992, and early January, 1993, the FBI conducted a background investigation of Cisneros which included interviews of Cisneros and others by FBI agents.

2. On December 30, 1992, the FBI conducted its first interview of Cisneros. During the course of the interview, he did not advise the interviewing agent of any information with respect to payments he had made to his former mistress, Linda D. Medlar (presently Linda D. Jones and hereinafter "Medlar").

3. A review of Medlar's personal bank records subsequently conducted by the OIC, reveals that as of the date of this first FBI interview of Cisneros, he had provided Medlar with approximately \$160,000.00.

4. By January 7, 1993, the FBI had become aware of information as part of its background investigation which indicated Cisneros may have made cash payments to Medlar.

5. On January 7, 1993, the FBI again interviewed Cisneros and asked specific questions concerning his relationship with Medlar and his payments to her. During this interview, Cisneros intentionally concealed and omitted information with regard to, among other things, the subject matter of his relationship with and payments to Medlar. The FBI report of that interview provides in pertinent part:

When specifically asked about the payments to Medlar, Cisneros advised that the payments were irregular in timing, and that **he paid taxes on all receipts he was paid as salary for speeches made** and he emphasized that the payments to Medlar were not "hush money". . . **Cisneros reemphasized that he paid federal and state and local income taxes on all monies received.**

* * *

According to CISNEROS the highest individual payment to MEDLAR was about twenty-five hundred dollars, and the total paid to MEDLAR never exceeded ten thousand dollars in any given year; CISNEROS emphasized that if this amount was reached or surpassed in 1992, he realizes he will have to pay gift taxes on the amount given to MEDLAR in excess of ten thousand dollars.

* * *

FBI FD-302 [REDACTED] pp. 1-2 (emphasis added).

6. As part of its background investigation of Cisneros, the FBI also interviewed various of his employees and associates. A number of these individuals concealed information from the FBI with respect to Cisneros' relationship with and payments to Medlar, as well as other matters, including the non-payment of taxes.

7. On January 8, 1993, the FBI attempted to interview Medlar at her residence in Lubbock, Texas, as part of Cisneros' background investigation. On that occasion, Medlar refused to answer questions regarding her relationship with Cisneros and told the interviewing agent not to re-contact her.

8. On December 27, 1994, Medlar admitted that when she was contacted by the FBI during Cisneros' background investigation, she and Cisneros had agreed to conceal information about their relationship from the FBI, including, among other things, the payments she received from him. (FD-302 of SA Claude Martin.)

9. By January 11, 1993, the FBI report of its Level 1 background investigation of Cisneros had been submitted to the Office of President-Elect Clinton and to Senator Donald W. Riegle, Jr. of Michigan, the then Chairman of the Senate Committee on Banking, Housing and Urban Affairs (Senate Banking Committee), the Committee with jurisdiction over Cisneros' confirmation.

10. Due in part to false statements and factual omissions by Cisneros, Medlar and certain employees and associates of Cisneros, the FBI report did not contain complete information on Cisneros' relationship with and payments to Medlar. Moreover, the report did not reveal that Cisneros, Medlar and others had agreed to conceal these matters from the FBI and others who inquired.

11. On January 12, 1993, the Senate Banking Committee conducted Cisneros' confirmation hearing. In its hearing, the Committee did not address Cisneros' relationship with Medlar, his payments to her, the purposes of the payments, the source of the funds used for the payments or whether the taxes were paid on those funds. Cisneros was subsequently confirmed as HUD Secretary by the Senate.

12. Post-Confirmation, Secretary Cisneros alone and in conjunction with others, through various means, made additional payments to Medlar totaling at least \$85,000.00 through late January 1994.

13. The payments to Medlar, from whatever source, appear to have stopped in January, 1994. As a result, on July 29, 1994, Medlar filed a civil suit in the 72nd District of Lubbock, Texas, against Secretary Cisneros entitled Linda Medlar v. Henry G. Cisneros, 94-547854, which claimed, among other things, that Secretary Cisneros violated an agreement wherein he allegedly agreed to pay her \$4,000.00 per month until her teenage daughter graduated from college. As a result, it was revealed that Medlar had recorded certain telephone conversations she had with Secretary Cisneros and others during the period 1990 through 1993.

14. In September, 1994, based on information made public as a result of Medlar's lawsuit against Secretary Cisneros, the FBI began a preliminary investigation of Secretary Cisneros pursuant to the Ethics in Government Act, 28 U.S.C. § 591 et seq.

INFORMATION RECEIVED

D. Predicated on the objective of tracking cash payments made to Medlar by Cisneros and others acting on his behalf, the affiant conducted an analysis of Cisneros' and

Medlar's finances in order to determine: (1) the nature, extent and motivation for the payments; (2) the identity of all participants in the payments; and (3) the identity and motivation of all participants involved in the concealment of the payments. The affiant: (1) interviewed witnesses; (2) reviewed reports of interviews conducted by other agents; and (3) examined volumes of financial documents relating to Cisneros and Medlar including, but not limited to, bank statements, deposit slips, checks received by Cisneros and/or Medlar, wire tickets and Currency Transaction Reports. The IC received some of this information from the IRS pursuant to an Ex Parte Order under 26 U.S.C. § 6103. Moreover, statements contained within this affidavit are based upon information the affiant has received from other federal agents in the form of oral statements as well as a review of certain documents relevant to the OIC's investigation.

Introduction

1. To date, the OIC's investigation has revealed, among other things, that in 1989 Cisneros began making payments to his then-mistress, Medlar, to satisfy her demands for financial support. The payments were regular although they varied in amount and frequency. At that time, Cisneros was no longer Mayor of San Antonio and, as a result, had begun earning his income exclusively from the private sector.

2. Cisneros received income from, among other things, his consulting work for various companies and speeches given throughout the United States. Monies used for the payments came from several sources, but most of the payments made to Medlar are directly traceable to Cisneros' consulting and speech income.

3. The OIC's investigation has further revealed that Cisneros and Medlar, in an effort to conceal potentially damaging information about Cisneros, agreed and conspired in December of 1992 to conceal and keep concealed from the FBI and any other individual or entity that inquired, the true nature, extent and motivation concerning Cisneros' payments to Medlar as well as other potentially disqualifying and/or embarrassing information about Cisneros and known by Medlar. Pursuant to this agreement, Cisneros made false statements to the FBI and concealed information from FBI agents on December 30, 1992, and January 7, 1993.

4. Since 1989, Secretary Cisneros made payments to Medlar for the purported purpose of financial support. However, after Secretary Cisneros conspired with Medlar and others to conceal information concerning Medlar from the FBI, the payments began to serve additional purposes, one of which was that Medlar would maintain her silence concerning the conspiratorial agreement with Secretary Cisneros and his false statements to the FBI. Thereafter, Secretary Cisneros, alone and in conjunction with others, continued making payments to Medlar throughout 1993 and into 1994.

5. The affiant, during the course of the investigation, more specifically the financial examination of Secretary Cisneros' books and records, observed a steady dissipation of

assets, an increase in liabilities and an overall decrease in net worth. Throughout the period 1989 through 1994, Secretary Cisneros had a relatively serious cash flow problem which was exacerbated by his making regular cash payments to Medlar. Secretary Cisneros also had credit problems evidenced by, among other things, his wife's inability to obtain a certain department store's credit card because of a poor credit history. The affiant has reason to believe, based upon specific and credible evidence, that an overall depressed financial condition motivated Secretary Cisneros, in whole or in part, to underreport his taxable income and evade taxes as detailed herein.

The IRS Investigation of Secretary Cisneros

6. During the early stages of its investigation, the OIC learned that since October 21, 1994, the Internal Revenue Service, Criminal Investigation Division ("IRS-CID") in San Antonio, Texas, had been conducting an administrative tax investigation into Secretary Cisneros' income tax liability for the years 1989-1994. The focus of IRS-CID's investigation was whether Secretary Cisneros evaded the payment of income taxes on all income received, including, but not limited to, monies he used to make payments to Medlar. The OIC learned that the IRS-CID had interviewed some of the same witnesses the OIC intended to interview and that the IRS-CID had issued summonses and obtained evidence relating to matters within the OIC's prosecutorial jurisdiction.

7. After learning of the IRS-CID investigation, the OIC obtained an Ex Parte disclosure Order pursuant to 26 U.S.C. § 6103, which authorized the IRS to disclose to the OIC certain information gathered during the IRS-CID's administrative tax investigation.

8. The OIC further learned that the IRS possessed 86 cassette tapes containing what Medlar purported to be the original recordings of her conversations with Secretary Cisneros and others.

9. The IRS disclosed information in compliance with the Ex Parte disclosure Order including the aforementioned 86 cassette tapes.

10. Pursuant to the IRS-CID investigation, IRS SAs Kesha Lange and Dorman Barrows interviewed Secretary Cisneros in the presence of counsel in Washington, D.C. on January 26, 1995. At that time, Cisneros knew not only that the IRS was investigating whether he paid federal income taxes on his income, including funds paid to Medlar, but that DOJ was conducting a preliminary investigation to determine whether his conduct with respect to Medlar warranted the appointment of an Independent Counsel. The IRS report of the interview provides in pertinent part:

Cisneros stated he was **“meticulous, scrupulous and uncompromising in making sure that everything was reported for taxes.”** To the best of his knowledge that all of his income was reported on his income tax returns for the years 1989 to 1993.

IRS Report of SAs Lange and Barrows, p.6 (emphasis added).

These apparently false statements made on January 26, 1995, are consistent with Secretary Cisneros' false statements to the FBI made two years earlier on January 7, 1993. In that January 7, 1993, interview, Secretary Cisneros told the FBI: (1) that he paid taxes on all receipts he received in connection with his communication (speech) business; and (2) that he paid federal, state and local taxes on all monies he received.

**The Department of Justice/Public Integrity Section's
Preliminary Investigation of Secretary Cisneros**

11. The IRS's administrative tax investigation began during October, 1994, shortly after the Attorney General had begun her preliminary investigation of Secretary Cisneros on October 14, 1994.

12. During the preliminary investigation, the Department of Justice, Public Integrity Section (“DOJ/PIS”) examined a total of eight (8) income checks made payable to Secretary Cisneros as part of its effort to determine whether he underreported his income for tax years 1991 and 1992. Specifically, DOJ/PIS examined seven (7) income checks received by Secretary Cisneros in tax year 1991 and one (1) income check received by Secretary Cisneros during tax year 1992.¹ During the affiant's analysis of Secretary Cisneros' finances, the affiant examined not just these eight (8) checks, but all known funds received by Secretary Cisneros between 1989-1993.

13. OIC also learned that during the preliminary investigation, the FBI notified an attorney at DOJ/PIS about the existence of the IRS administrative tax investigation. OIC Interview of SA Claude Martin, on June 25, 1996.

14. DOJ/PIS did not seek disclosure of the IRS materials by **Ex Parte** Order pursuant to 26 U.S.C. § 6103(I) or other means. 26 U.S.C. § 6103(I) authorizes the disclosure of return and return information to officers or employees of any federal agency engaged in “any investigation which may result in [a judicial or administrative proceeding pertaining to the enforcement of a specifically designated federal criminal statute] . . . solely for the use of such officers and employers in such [investigation].” 26 U.S.C. § 6103(I)(1)(A) and (B).

¹ The total amount of these checks is \$14,942.21.

15. Further, the existence of the IRS administrative tax investigation was not disclosed in the memorandum to the Attorney General dated February 27, 1995, which announced the results of the preliminary investigation ("DOJ/PIS Memorandum"): (1) "... there is no evidence that Cisneros underreported his income," DOJ/PIS Memorandum at p. 44; and, (2) certain gift tax issues "should be referred to the IRS for further investigation," DOJ/PIS Memorandum at p. 46. Finally, the memorandum provided that "[t]hough we may suspect based on available information that [gift tax returns] have not been filed by Secretary Cisneros, because of disclosure prohibitions we cannot be sure of this until the IRS conducts its own investigation."

16. Consistent with the DOJ/PIS Memorandum, the Application to the Court pursuant to 28 U.S.C. § 592(c)(1) for the Appointment of an Independent Counsel ("Application") dated March 13, 1995, provided that "[o]ur investigation developed **no evidence** that Secretary Cisneros **failed to pay any income or gift taxes due in connection with his payments to [Medlar].**" (emphasis added). The Application then concluded that "... no further investigation of this matter is warranted as a criminal tax matter ..."

17. The Special Division appointed David M. Barrett as Independent Counsel on May 24, 1995, to investigate whether Secretary Cisneros made false statements to the FBI during his background investigation in connection with his payments to Medlar.

PAYMENTS MADE BY SECRETARY CISNEROS OR ON HIS BEHALF TO MEDLAR

E. The analysis the affiant conducted on evidence and information acquired from the IRS and the aforementioned sources revealed payments from Secretary Cisneros and/or others on his behalf to Medlar from 1989 through 1994 and other facts as they pertain to potential violations of federal criminal law.

CISNEROS' EVASION OF INCOME TAX IN 1989

F. In an effort to determine if funds Cisneros received in 1989 from First Gibraltar, F.S.B. ("Gibraltar"), a Texas banking institution, were funneled (in whole or in part) to Medlar, the affiant conducted a review of all relevant documentation regarding this transaction. The examination revealed the following:

1. On July 31, 1989, Cisneros and Gibraltar entered into a contract for services whereby he would provide to Gibraltar approximately 10% to 15% of his time each month, ostensibly in the area of public relations. In return, Gibraltar agreed to pay Cisneros a fee at the rate of \$80,000.00 per year, payable in twelve monthly installments of \$6,666.67 on the first day of each calendar month.

2. In contravention of the terms set forth within the contract for services, Gibraltar paid Cisneros the entire \$80,000.00 via check number [REDACTED] dated August 6, 1989, drawn on First Texas Savings Association. These funds were paid to Cisneros before any services were rendered. Moreover, according to the Office of Thrift Supervision ("OTS"), the agency that examined Gibraltar in 1990, Cisneros never produced any tangible work product in return for the \$80,000.00; and further, that Gibraltar's parent reimbursed Gibraltar for the \$80,000.00 it improperly expended to pay Cisneros for what was, in effect, a "no-show" job.

3. On August 21, 1989, Cisneros deposited the \$80,000.00 check into two accounts he maintained at First Interstate Bank in San Antonio, Texas. According to bank records received from First Interstate, Cisneros deposited \$34,000.00 of the \$80,000.00 check into account number [REDACTED], his personal checking account, and deposited \$30,000.00 into account number [REDACTED], his business checking account (Cisneros Communications). Cisneros retained the remaining \$16,000.00.

4. A review of tax workpapers received from Rene Gonzalez (a San Antonio CPA and the preparer of Cisneros' 1989 individual tax return), including, but not limited to, the working trial balance, current general ledger, statement of honorariums, income and expense summary, tax returns and related records, and cash receipts log, revealed that Cisneros reported \$64,000.00 (the funds deposited into his First Interstate accounts) of the \$80,000.00 from Gibraltar, but failed to report the remaining \$16,000.00. Accordingly, this money was never included in income and taxed.

5. On August 22, 1989, the day after Cisneros personally deposited all but \$16,000.00 of the \$80,000.00 received from Gibraltar, a \$3,000.00 cash deposit was made into Medlar's bank account at Broadway National Bank, account number [REDACTED], in San Antonio, Texas.

6. In view of the facts set forth in paragraphs F.1-5 above, there is reason to believe, based upon specific and credible evidence, that Cisneros understated his gross income for tax year 1989 in the amount of \$16,000.00, of which a portion went to Medlar, and thereby evaded the payment of income tax and made false statements to the FBI and the IRS about this matter.

CISNEROS EVASION OF INCOME TAX IN 1991²

G. 1. Since the late 1980s and continuing through January, 1993, Cisneros earned the majority of his income as a guest speaker/lecturer; the majority of his clients were business, trade and civic organizations who hired Cisneros to speak on a variety of topics. Cisneros' trade name was Cisneros Communications, an unincorporated sole proprietorship based in San Antonio, Texas. Cisneros Communications generally employed approximately four individuals who performed a myriad of administrative functions, including the recordation and accounting of income.

2. At the conclusion of the 1991 tax year, December 31, each organization that compensated Cisneros for a speaking fee and/or travel reimbursement was required, pursuant to IRS regulations, to issue in his name or that of Cisneros Communications a Form 1099. A 1099 states how much a particular entity paid to an individual and for what purpose, in this case for miscellaneous income, i.e., for giving a speech. The payor organization is also required to transmit to the IRS a listing of all 1099s it issued during the calendar year.

3. During 1991, Cisneros and/or Alfred Ramirez, an employee and friend of Cisneros acting on his behalf, deposited \$70,524.21 into Medlar's checking account at Broadway National Bank, San Antonio, Texas, account number [REDACTED]. Of this amount, \$58,582.00 was deposited in cash; the remaining funds of \$11,942.21 were comprised of checks made payable to Cisneros. Various organizations issued these checks to Cisneros, presumably for speaking fees and travel reimbursements.

4. The affiant reviewed tax workpapers furnished by Gonzalez and Luis Hernandez (a San Antonio, Texas, CPA who Cisneros retained in the Spring of 1992 to complete his 1991 individual tax return). The purpose of the review was to determine the frequency, source, size, duration and other facts and circumstances of Cisneros' payments to Medlar to ascertain whether Cisneros had lied to the FBI about his payments to Medlar, including Cisneros' assertion that he paid taxes on all monies received which, of course, include those paid to Medlar. To this end, affiant reviewed Cisneros' tax returns and underlying workpapers to determine how Hernandez calculated Cisneros' income. According to the tax return and the underlying workpapers, Hernandez calculated Cisneros' business income by compiling all 1099s he received from the various organization, i.e., "the 1099 method." Hernandez neither considered the amounts deposited into Cisneros' bank accounts (personal, business or otherwise) in computing gross income, nor did he consider income checks that Cisneros and others cashed

² Affiant's examination with respect to tax years 1991, 1992 and 1993 encompassed a sources and uses analysis of monies deposited into and withdrawn from Cisneros' and Medlar's known bank accounts. Records examined included all relevant source evidence including, but not limited to, bank statements, deposit slips, checks, wire transfers and Currency Transaction Reports.

while acting on his behalf for the benefit of Medlar. Again, Hernandez relied on the 1099s Cisneros and members of his staff furnished him. Moreover, during a February 8, 1995, interview with an FBI agent, Hernandez advised that he was unaware of any income checks that were not corroborated by 1099s and/or deposited into Cisneros' bank accounts. (FD-302 of SA Claude Martin.)

5. Although each payor organization was supposed to have issued Cisneros a Form 1099, a comparison of known speaking engagements to the 1099s used in the computation of income revealed that numerous organizations failed to issue the requisite documents. Accordingly, a discrepancy exists between the amount of income earned and the amount of income reported on Cisneros' individual income tax return.

6. During an April 4, 1996, interview with IRS SAs Barrows and Lange in San Antonio, Texas, Hernandez made the following statements regarding the preparation of Cisneros' 1991 individual income tax return:

- a. Hernandez advised that neither Cisneros nor his employees ever told him some income checks were cashed or not deposited;
- b. Hernandez stated that he had a "gut feeling" that some income may not have been deposited in 1991; and,
- c. Hernandez stated that Cisneros and all of his employees knew that all income had to be deposited.

7. According to information the IRS gathered during its administrative tax investigation, however, Cisneros underreported approximately \$126,000.00 in taxable income. In view of this information, there is reason to believe that Secretary Cisneros evaded the payment of income taxes in 1991 and made false statements to the FBI and the IRS about this matter. Because further investigation is warranted with respect to the identification of all organizations who retained the services of Cisneros, the exact amount, however, cannot be quantified at this time.

CISNEROS' EVASION OF INCOME TAX IN 1992

H. 1. During 1992, Cisneros and others acting on his behalf, deposited \$63,200.00 into Medlar's bank account number [REDACTED], at Broadway National Bank, San Antonio, Texas. Of this amount, \$59,200.00 was in cash, \$3,000.00 was in the form of a check made payable to Cisneros (presumably for a speaking fee), and \$1,000.00 was from one of Cisneros' bank accounts. Cisneros obtained the vast majority of this money through Cisneros Communications, as a result of his giving speeches.

2. An examination of Cisneros' 1992 individual tax return (Form 1040) revealed that he reported \$371,085.00 in revenue from Cisneros Communications.

3. A review of workpapers and related source data from Hernandez revealed that (Hernandez) computed the above revenue figure (\$371,085.00) by utilizing the "deposit method." According to an itemized income and expense account report Hernandez prepared internally, he calculated income by adding deposited items from four bank accounts in the name of Cisneros at First Interstate Bank, San Antonio, Texas. These accounts are:

- a. [REDACTED]
- b. [REDACTED]
- c. [REDACTED]
- d. [REDACTED]

4. Moreover, a thorough review of the itemized income and expense report revealed that only deposits made **through October 5, 1992**, were included as part of Cisneros' 1992 income: **deposits made after this date were not included on the itemized income and expense report and, accordingly, were not included on Cisneros' 1992 individual income tax return.** Hernandez made the following statements (which are followed in parenthesis by the source of the statements) regarding the preparation of Cisneros' 1992 tax return:

- a. Hernandez stated that he used the "deposit method" to calculate Cisneros' Schedule C Income in 1992 as all deposits were treated as income. (FBI SAs George Parks and Claude Martin January 26, 1995, interview of Hernandez in San Antonio, Texas);
- b. Hernandez stated that he was unaware of any deposits/income after the first week of October, 1992. (IRS SAs Barrows and Lange April 4, 1996, interview of Hernandez in San Antonio, Texas);
- c. Cisneros advised Hernandez that he did not give any lectures after the first part of October, 1992, because he was involved with the Clinton Presidential campaign and that the only income received after the first part of October

would be de minimis. (IRS SAs Barrows and Lange April 4, 1996, interview of Hernandez in San Antonio, Texas); and,

- d. Hernandez requested from Cisneros and his employees, bank statements for the end of 1992; however, he never received any. (IRS SAs Barrows and Lange April 4, 1996, interview of Hernandez in San Antonio, Texas).

5. Based on a deposit analysis to ascertain sources of funds, the affiant calculated that Cisneros did not report income in the amount of \$75,364.00 for the last three months of 1992.

This figure encompasses speaking fees and taxable travel reimbursements. Cisneros deposited additional funds received totaling \$11,564.00 in the last three months of 1992, however, additional investigation is warranted to determine the taxability of these funds.

Cisneros utilized at least \$28,500.00 to make payments to Medlar during the months of October, November and December, 1992. Cisneros "structured" two payments of \$8,000.00 to Medlar's Broadway National Bank account on December 16, 1992, and December 18, 1992, both of which Sylvia Arce-Garcia, an employee of Cisneros, deposited into this account.³ Cisneros knew that he would be subject to a FBI background investigation in connection with his HUD appointment when these payments occurred. Medlar used the \$16,000.00 to purchase a new home in Lubbock, Texas. This house was purchased by Medlar via "straw-borrowers," namely, Medlar's sister, Patsy J. Wooten and her husband, Allen R. Wooten in violation of 18 U.S.C. §§ 1014 and 1344. Cisneros was aware that the house was not being purchased in Medlar's name. The house was ostensibly purchased in the Wooten name in order to, among other things, conceal Cisneros' connection with the transaction. Medlar purchased the house with the understanding that Cisneros' funding would enable her to pay off the bank's lien. In March, 1995, after the Cisneros payments stopped, Medlar, through her relatives, was forced to sell the house.

6. Based on a review of 25 income checks (in contrast to the one (1) 1992 income check DOJ/PIS examined during the preliminary investigation) that were either cashed, deposited directly into Medlar's bank account or deposited to accounts Cisneros did not disclose to CPA Hernandez, the affiant has reason to believe, based upon specific and credible evidence, that Cisneros underreported an additional \$52,745.00 in taxable income for tax year 1992. Regarding this unreported income, the following statements were made:

³ On December 31, 1992, Arce-Garcia denied knowledge of payments from Cisneros to Medlar during Cisneros' background investigation. (See, ¶ J.2., infra.)

- a. Hernandez advised that he did not fear that income checks were not being deposited since he had been told by Cisneros that all income checks were deposited. (IRS SAs Barrows and Lange April 4, 1996, interview of Hernandez, in San Antonio, Texas)
- b. During a telephonic conversation between Cisneros and Medlar on December 30, 1992, which she tape recorded, Cisneros purportedly made the following statement regarding the taxation of money he was giving her:

Medlar: "Don't panic, they didn't say anything about the money?"

Secretary Cisneros: "No, but I talked to Sylvia⁴ and she said that they talked to Luis Hernandez, the accountant and asked him today whether he knew of any payments and he said no, he did not because he does not, he doesn't get involved in that, he accounts for the money we put into the system and the money that I help you with comes before that, comes out before it gets to him." (emphasis added).

7. As set forth above, the OIC has determined that Cisneros and Medlar and others conspired not only to make false statements and to conceal information via lies and omissions from the FBI and other entities concerning his relationship with, and payments to Medlar during the FBI background investigation, but also that the conspiracy continued post-confirmation. To that end, Cisneros alone and in conjunction with others continued to make payments to Medlar.

In this regard, the affiant examined the origin of certain funds paid by Cisneros to Medlar during calendar year 1993, which relate to an improper \$30,000.00 deduction taken by Cisneros for tax year 1992. This examination revealed the following information:

- a. During the calendar tax year of 1992, Cisneros made twelve \$2500.00 monthly payments to Lincoln Benefit Life Company ("Lincoln Benefit") pursuant to an Annuity Agreement dated May 17, 1991, account number [REDACTED]. This money was automatically withdrawn from his personal bank account at First Interstate Bank per a pre-authorized agreement beginning mid 1991. Affiant's

⁴ Sylvia is the Sylvia Arce-Garcia, referenced in Section J.2. herein.

review of the documentation received from Lincoln Benefit, including, but not limited to, the Annuity Agreement, revealed that Cisneros had purchased the annuity as a personal investment and not a retirement plan, i.e., not an IRA, Keogh, SEP, etc. Moreover, telephonic conversations between the affiant and Lincoln Benefit personnel revealed that this plan, "Futurist I," was a non-qualifying savings plan similar to a savings account.

- b. On January 15, 1993, Secretary Cisneros requested a complete liquidation of this account.
- c. On February 1, 1993, Lincoln Benefit mailed Secretary Cisneros a check in the amount of \$49,686.06. The investigation has revealed that because this distribution was from an annuity plan, which had not been carried to maturity and was not from a retirement plan, this money was not taxable to Secretary Cisneros. Accordingly, Lincoln Benefit issued no Form 1099 and Secretary Cisneros did not (nor was he required) to report this money on his 1992 or 1993 individual income tax return.
- d. On February 9, 1993, Secretary Cisneros deposited \$29,686.06 of the \$49,686.06 Lincoln Benefit payment in account number [REDACTED], an interest bearing checking account he maintained at Crestar Bank in Washington, D.C.
- e. On the same date, Secretary Cisneros deposited the remaining \$20,000.00 of the Lincoln Benefit payment into another Crestar Bank in Washington, D.C., namely account number [REDACTED], a money market account. The statements for these accounts were addressed to Secretary Cisneros' office at [REDACTED] not to his residence.
- f. On February 10, 1993, Secretary Cisneros deposited \$7,500.00 via wire transfer from his Crestar account, number [REDACTED], into Medlar's personal bank account at First National Bank of Lubbock, account number [REDACTED]. The source of these funds was the distribution Secretary Cisneros received from Lincoln Benefit in February, 1993.

- g. On February 16, 1993, Secretary Cisneros deposited \$15,000.00 via wire transfer from his Crestar account, number [REDACTED], into Medlar's personal bank account at First National Bank of Lubbock, number [REDACTED]. The source of these funds was the distribution Secretary Cisneros received from Lincoln Benefit in February, 1993.
- h. On February 24, 1993, Secretary Cisneros deposited \$15,000.00 via wire transfer from his Crestar account, number [REDACTED], into Medlar's personal bank account at First National Bank of Lubbock, number [REDACTED]. The source of these funds was the distribution Secretary Cisneros received from Lincoln Benefit in February, 1993.
- i. On March 15, 1993, Secretary Cisneros deposited \$10,873.45 via wire transfer from his Crestar account, number [REDACTED] (\$4,191.14) and number [REDACTED] (\$6,682.31), into Medlar's personal bank account at First National Bank of Lubbock, number [REDACTED]. The source of these funds was the distribution Secretary Cisneros received from Lincoln Benefit in February, 1993. This last wire transfer, for all practical purposes, liquidated both Crestar accounts.
- j. The affiant reviewed workpapers Hernandez furnished in order to ascertain how he accounted for the payments Secretary Cisneros made to Lincoln Benefit. The review focused on the itemized income/expense account report for the period January 1, 1992 through December 31, 1992, Secretary Cisneros' personal bank accounts at First Interstate and his 1992 individual income tax return. This review revealed the following:
- (i) Secretary Cisneros' 1992 payments to Lincoln Benefit were classified as a contribution to a retirement account. In the margin of the itemized income/expense account, Hernandez made the calculation -- "12 x \$2,500.00 = \$30,000.00."
 - (ii) Secretary Cisneros' 1992 individual income tax return includes a \$30,000.00 deduction for a contribution to a retirement account. Secretary Cisneros deducted this amount on line 27 of Form

1040 -- Keogh retirement plan and self-employed SEP deductions -- within the classification "Adjustments to Income." Secretary Cisneros used this deduction to offset \$30,000.00 of gross income.

- (iii) Hernandez stated that Cisneros, Ramirez and Arce-Garcia all told him that the \$2,500.00 Lincoln Benefit monthly payment was for a retirement plan. (IRS SAs Barrows and Lange, October 19, 1996. Interview of Hernandez.)

- k. In summary, Secretary Cisneros was not entitled to take a \$30,000.00 deduction for a contribution to a retirement account because:
 - (i) Contributions made to Lincoln Benefit were for the purchase of an annuity -- not a retirement fund; and,
 - (ii) The money that was distributed in February, 1993, the majority of which was used by Secretary Cisneros to pay Medlar, was not taxable and was not included in his 1993 gross income.
- l. Secretary Cisneros' improper deduction of \$30,000.00 in 1992 resulted in a \$30,000.00 reduction of taxable income from his 1992 individual income tax return.

8. In view of the facts set forth in ¶¶ H. 1-7, there is reason to believe, based upon specific and credible evidence, that Secretary Cisneros understated his gross income for tax year 1992 in the amount of \$158,109.00, and thereby evaded the payment of income tax and lied to the IRS about this matter.

CISNEROS' EVASION OF INCOME TAX IN 1993

I. From 1993 through early 1993, Medlar received at least \$85,000.00 in cash from Cisneros and persons acting on his behalf. This figure includes the \$48,373.45 wire transferred from Cisneros' Crestar account to Medlar which was sourced by Cisneros' liquidation of his Lincoln Benefit account as set forth above. In addition to those payments, investigation revealed the following:

1. On February 5, 1993, Secretary Cisneros requested and subsequently received distributions from three Mass Mutual Individual Retirement Accounts (IRAs) as follows:

<u>Account Number</u>	<u>Amount</u>
██████████	\$13,745.50
██████████	19,786.25
██████████	2,836.23

2. Documentation received from Mass Mutual (Form 1099) revealed that distributions from account numbers ██████████ and ██████████, totaling \$33,531.75, were taxable. The distribution from account number ██████████ was deposited on or about February 18, 1993, to Secretary Cisneros' account at the Bank of the West, San Antonio, Texas. Distributions from account numbers ██████████ and ██████████ were deposited on or about February 24, 1993, to Secretary Cisneros' account at Riggs National Bank, Washington, D.C. While the proceeds of these distributions do not appear to be connected to payments Secretary Cisneros made to Medlar, these distributions partially enabled Secretary Cisneros to satisfy his financial obligations that would have otherwise gone unsatisfied or would have been satisfied by money that was used to pay Medlar. This is especially true in light of Secretary Cisneros' poor financial condition at the time.

3. The affiant reviewed Secretary Cisneros' 1993 individual income tax return to ascertain whether he reported as taxable income the \$33,531.75 distribution he received from Mass Mutual. According to this income tax return, Secretary Cisneros did not include this money anywhere within the income classification. This money, accordingly, was not taxed.

4. Mass Mutual mailed a Form 1099 reflecting these distributions to Cisneros.

5. Hernandez made the following statements regarding distributions made from Cisneros' Mass Mutual Accounts: Hernandez was not told by Secretary Cisneros of any distributions from Mass Mutual or (Lincoln Benefit) in 1993. Nor did he receive any form 1099s for these accounts from Cisneros. (IRS SAs Barrows and Lange, October 19, 1996, interview of Hernandez).

6. In total, for the tax year 1993, Secretary Cisneros' personal tax liability was \$118,386.00. During the year, he paid in \$47,761.00 to the IRS in the form of federal withholding from his pay check which left a balance due of \$70,625.00.

a. In April of 1994, Secretary Cisneros, because he lacked the requisite financial resources to pay this liability, requested permission from the IRS to repay this debt over a

protracted period in the form of monthly payments of \$1,100.00. This request, dated April 10, 1994, was made via a formal letter from Secretary Cisneros to the IRS Austin District Office, Austin, Texas.

- b. In May of 1994, the IRS rejected Secretary Cisneros' request to pay his taxes via an installment plan.
- c. In June of 1994, Secretary Cisneros applied for and received a \$100,000.00 personal loan from the International Bank of Commerce ("IBC") in Laredo, Texas.
- d. On June 28, 1994, Secretary Cisneros deposited the \$100,000.00 loan proceeds in an IBC demand deposit account.
- e. On June 29, 1994, Secretary Cisneros disbursed \$67,000.89 from this account via a cashier's check payable to the IRS, ostensibly to pay the 1993 outstanding balance.
- f. By borrowing the necessary funds and paying the tax in full, Secretary Cisneros was able to avoid the IRS filing a tax lien on his personal property.

7. Based on the foregoing series of transactions, the affiant has reason to believe that Secretary Cisneros' lack of disposable funds and poor financial condition motivated him, in whole or in part, to underreport taxable income and evade tax for tax year 1993.

8. In view of the facts set forth above, there is reason to believe that Secretary Cisneros understated his gross income for tax year 1993 in the amount of \$33,531.75 and thereby evaded the payment of income tax and lied to the IRS about this matter.

OVERLAP OF PERSONS/WITNESSES AND DOCUMENTARY EVIDENCE

J. Based on investigation to date, there is a considerable overlap of participants in the false statement and tax evasion allegations. In addition, substantial documentary evidence establishing payments made to Medlar, and thus the false statement allegations, also establishes the tax evasion allegations.

By means of illustration and not limitation, Cisneros as the payor and Medlar as the recipient of funds are clearly central figures in both sets of allegations. Furthermore, as a result of their knowledge of, and/or participation in Cisneros' payments to Medlar, certain of Cisneros'

employees at Cisneros Communications also have information regarding the tax evasion allegations; for example:

1. Alfred Ramirez, Cisneros' close personal friend and President of Cisneros Communications, which he operated on a day-to-day basis until September of 1992, when he left its employ, personally participated in making numerous payments to Medlar on Cisneros' behalf. In addition to having personal knowledge of the nature and extent of Cisneros' payments to Medlar, Ramirez, due to his employment, had personal knowledge of Cisneros Communications' bookkeeping and banking practices, its financial condition as well as Cisneros' finances, all of which are directly relevant to the income tax allegations. During Cisneros' background investigation, Ramirez concealed information from the FBI concerning, among other things, payments to Medlar.

In July, 1993, Ramirez became a Special Assistant to the President -- Associate Director -- Personnel, a GS position at a \$85,000.00 per year salary. In October, 1993, Ramirez became Senior Advisor to Public Liaison Corporation for National and Community Service, a Senior Executive Service ("SES") position at a salary of \$92,000.00. In July, 1994, Ramirez became Director, White House Initiative on Hispanic Education, operated from the Department of Education, a GS-15 position classified SES at a \$95,531.00 salary. (Ramirez, Department of Education personnel records.) Ramirez ostensibly secured all of these high government positions with the intervention and assistance of Cisneros. Therefore, by mid-1994, Ramirez's government salary had increased approximately \$54,000.00 from his Cisneros Communications salary where he earned \$42,000.00 a year. (Ramirez, Department of Education personnel records.)

2. Another Cisneros Communication employee, Sylvia Arce-Garcia, a long-time confidant of Cisneros, and his Personal Assistant at Cisneros Communications, also had personal knowledge of and participated in making payments to Medlar on Cisneros' behalf. In addition to having personal knowledge of Cisneros' relationship with and payments to Medlar, Arce-Garcia, due to her employment at Cisneros Communications had personal knowledge of its accounts payable and receivable, methods of collection of income and payment of expenses as well as Cisneros' finances, all of which are directly relevant to the income tax allegations. Like Ramirez, Arce-Garcia concealed information concerning Medlar from the FBI during Cisneros' background investigation. For instance, in mid-December of 1992, Arce-Garcia deposited into Medlar's bank account at Cisneros' direction, \$8,000.00 on two separate days, December 16 and 18, 1992, for a total of \$16,000.00. On December 31, 1992, while being interviewed by the FBI as part of Cisneros' background investigation, Arce-Garcia denied knowing of any Medlar payments.

As set forth above, the investigation has revealed that these payments to Medlar were "structured" and thus in violation of, inter alia, 31 U.S.C. § 5324. Title 31 U.S.C. § 5324 makes it a federal crime to "structure" cash transactions in order to avoid the creation of a Currency Transaction Report ("CTR"), IRS Form 4789, which is required to be filed by financial

institutions with respect to all currency transactions in excess of \$10,000.00. OIC's investigation has revealed that on February 26, 1991, Ramirez, at the direction of Cisneros, deposited \$12,000.00 into Medlar's bank account at Broadway National Bank, account number [REDACTED]

[REDACTED] According to financial documentation reviewed by the affiant, namely Medlar's bank records, this was the first payment Cisneros made to Medlar that exceeded \$10,000.00. Because the deposit was made in cash and exceeded \$10,000.00, Broadway National Bank, pursuant to federal law, filed a CTR with the IRS regarding this transaction. A review of the CTR revealed that Ramirez did not disclose the fact that the deposit was made on behalf of Cisneros, i.e., there is no information contained within the CTR that links Cisneros to the deposit. Nevertheless, from that day forward, all additional payments from Cisneros to Medlar were made in increments of less than \$10,000.00 to, inter alia, avoid the creation of CTRs and to ensure the payments would be kept secret.

Moreover, after Cisneros became HUD Secretary, Arce-Garcia personally participated in the continuing conspiracy and scheme to conceal information. Like Ramirez, Arce-Garcia also was rewarded with a high-paying federal job. Arce-Garcia became Cisneros' Personal Assistant at HUD, a GS-14 position where she earned a starting salary of \$47,920.00. This represented a \$17,920.00 raise from her job at Cisneros Communications where she was earning \$30,000.00 per year. (HUD Arce-Garcia personnel records.)

3. Yet another long-term Cisneros Communications employee, John Albert Rosales, who took over as President in September 1992, when Ramirez left, also allegedly had knowledge of Cisneros' payments to Medlar. In addition to having knowledge of Cisneros' payments to Medlar, Rosales, due to this employment at Cisneros Communications, which he operated on a daily basis and was responsible for dealing with accountants, also had knowledge of Cisneros Communications' financial condition and bookkeeping practices, all of which are relevant to the income tax allegation. Like his colleagues, Ramirez and Arce-Garcia, Rosales also concealed information from the FBI concerning Medlar during Cisneros' background investigation. And like Ramirez and Arce-Garcia, Rosales also was rewarded with a high-paying federal job. He became a Special Assistant to Cisneros at HUD, a GS-14 position where he earned \$56,287.00 a year. This represented a \$26,287.00 increase from his job at Cisneros Communications where he was earning \$30,000.00 a year. (HUD Rosales personnel records.)

4. In addition to Ramirez, Arce-Garcia and Rosales, other employees of Cisneros Communications also have information concerning Cisneros' payments to Medlar and knowledge of Cisneros Communications bookkeeping practices and financial conditions.

5. Not only do certain Cisneros Communications employees have information regarding false statement and tax evasion allegations, others do as well. Again, by means of illustration and not limitation, Luis Hernandez, who took over from Rene Gonzalez as Cisneros' personal and business CPA in April, 1992, possesses detailed information not only about the tax and bookkeeping practices of Cisneros Communications and its and Cisneros' financial condition, but suspected that Cisneros had made payments to Medlar. Furthermore, Hernandez is a witness to Cisneros' improper \$30,000.00 Lincoln Benefit deduction in tax year 1992 and his failure to declare the 1993 \$33,531.75 Mass Mutual IRA distribution for tax year 1993.


6. Not only is there a significant overlap in terms of persons with knowledge and information concerning the false statement and tax evasion allegations, there is a substantial overlap of documentary evidence. For instance, the same banking, business and accounting records not only establish the true amounts and timing of payments to Medlar, these records also establish income received by Cisneros via Cisneros Communications which, as set forth above, was not declared in part and thus substantiate the tax evasion allegations.

CONCLUSION

K. Based on the foregoing, there is reason to believe that Cisneros underreported taxable income for the tax years 1989, 1991, 1992 and 1993 and thereby evaded payment of income tax in violation of 26 U.S.C. § 7201 and filed false tax returns for such years in violation of 26 U.S.C. § 7201(1). Therefore, there is reason to believe that Cisneros violated 18 U.S.C. § 1001 as to statements he made to the FBI concerning his federal income taxes in connection with his FBI background investigation and 18 U.S.C. § 1001 and 26 U.S.C. § 7212(a) in connection with the IRS administrative investigation of his tax liability. In addition, there is reason to believe that Cisneros violated 18 U.S.C. § 371 by conspiring to defraud the IRS.

L. Further investigation is warranted to determine in totality, the amount, sources and scope of underreported income for the tax years 1989, 1991, 1992 and 1993 and the identity of all persons who participated in such activity as well as the nature and extent of their participation.

M. Further, affiant sayeth not.


T.J. ROBERTS
Special Agent
Federal Bureau of Investigation

Subscribed and sworn to before me this 28th day of January, 1997.



NOTARY PUBLIC
FOR WASHINGTON, THE DISTRICT OF COLUMBIA

MY COMMISSION EXPIRES: My Commission Expires May 14, 2000

Office of Independent Counsel
David M. Barrett
1990 K Street, N.W., Suite 420
Washington, D.C. 20006

Telephone (202) 974-5440

FAX: (202) 974-5459

February 24, 1997

DELIVERED BY HAND

Honorable Janet Reno
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re: In re Henry G. Cisneros

Dear Attorney General Reno:

We make this submission in further support of our Request for Expansion of Prosecutorial Jurisdiction Pursuant to 28 U.S.C. § 593(c) ("Expansion Request") in the above-referenced matter.

1. As set forth in our Expansion Request, specific, credible and substantial information exists that Cisneros inaccurately reported his taxable income for tax years 1989, 1991, 1992 and 1993 and took improper deductions for tax year 1992.
2. The inaccuracy of Cisneros' returns, independently developed during this Office's investigation, was apparently finally conceded to the Department by his attorney, Cono R. Namorato, Esquire, during a February 20, 1997, meeting with Deputy Assistant Attorney General Robert S. Litt and other Department officials.¹
3. It appears that the principal remaining issue is whether Cisneros acted willfully.



¹Namorato, who has represented Cisneros since September, 1994, appeared before the Department in connection with its initial inquiry and preliminary investigation concerning Cisneros.

4. Willfulness, an essential element of 26 U.S.C. §§ 7201 (tax evasion) and 7206 (filing a false return) goes to whether Cisneros voluntarily and intentionally violated the law. Thus, willfulness goes to Cisneros' state of mind.
5. As set forth in our Request for Expansion, including its attached Roberts Affidavit, and as subsequently conveyed to Tax Division and Public Integrity Section attorneys by this Office, substantial, clear, and credible evidence exists of Cisneros' willfulness.
6. Apparently Cisneros, through Namorato's representations to the Department, is now attempting to negate the willfulness element by asserting a "reliance" on and/or "shifting of responsibility" to his accountant defense(s).
7. This is inconsistent with Namorato's position during the Department's initial inquiry and preliminary investigation and in direct contradiction with Cisneros' own words on January 26, 1995. On that date, while being interviewed by IRS Special Agents, Cisneros asserted that:
 - a. he was "scrupulous, meticulous and uncompromising in making sure that everything was reported for taxes."
 - b. to the best of his knowledge, all of his income was reported on his income tax returns for the years 1989 to 1993.
8. The "reliance" on and/or "shifting of responsibility" to accountant defense(s) do not remove the issue of "willfulness" from jury consideration.
9. Aside and apart from showing reliance, in order to properly raise these defense(s), the taxpayer must show, among other things, that he did not withhold vital information from, or take action to mislead, the accountant.
10. Cisneros conducted his financial affairs in such a manner by failing to deposit income checks and cashing them so as to make it unlikely at best for his accountant to know about them, thereby including such figures as income. As he told Medlar, in a recorded December 30, 1992 telephone conversation:

Medlar: "Don't panic. they didn't say anything about the money?"

Cisneros: "No. but I talked to Sylvia and she said that they talked to Luis Hernandez. the accountant. and asked him today whether he knew of any payments and he said no. he did not because he does not. he doesn't get involved in that. he accounts for the money we put into the system and **the money that I help you with comes before that, comes out before it gets to him.**" (emphasis added).

11. Luis Hernandez, C.P.A., the accountant in question, provided conflicting versions of whether, among other things:
 - a. information was withheld from or not provided to him; and
 - b. whether he was aware that not all income items were being deposited into Cisneros' business account.
12. Notably, during Cisneros' background investigation, Hernandez asserted that he knew that not all funds were being deposited into Cisneros' accounts. In 1995, after Hernandez knew that Cisneros was under FBI and IRS investigation, Hernandez changed his story and said that he had no fear that all income checks were not being deposited because Cisneros told him that all checks were and each employee knew it.
13. Not only can Cisneros not show that there was complete disclosure to, and no information withheld from, Hernandez, on this record Cisneros has not specifically shown what advice was given and actually and reasonably relied on. Nor has Cisneros shown that he did not know, or later discover, the advice, whatever it was, to be wrong, or that he did not doubt or later come to doubt it.
14. It is therefore unclear whether Cisneros would even be entitled to a "theory of defense" charge regarding any "reliance" on or "shifting of responsibility" to his accountant defense.
15. Even if no information was withheld from Hernandez and Cisneros has a "plausible rebuttal" of evidence that is adverse to him, the issue remains whether he acted willfully in light of all of the evidence. That determination goes to his state of mind.

16. Cisneros had a motive to underreport his income. By the last quarter of 1992, he was short of funds and knew that if then candidate Clinton won the election he would be offered a Cabinet position. Accepting a Cabinet position would result in a substantial decrease in his salary. In order to keep Medlar happy and thus quiet, he had to pay her substantial sums of money. Indeed, after becoming HUD Secretary, he liquidated his assets to pay her.
17. Regardless of what figures Hernandez included on the returns, as the person who earned the income which he spent, Cisneros would have known that the income figures were inaccurate. Hernandez's performance cannot excuse Cisneros' responsibility. Therefore, his intent or state of mind is still in issue: did he act willfully or not?
18. Since there is conflicting evidence of Cisneros' willfulness, there cannot be "clear and convincing evidence" that he lacked the requisite "state of mind" with respect to, inter alia, 26 U.S.C. §§ 7201 and 7206.
19. Since there is no "clear and convincing evidence" that Cisneros lacked the requisite state of mind, a finding that there are "no reasonable grounds to believe that further investigation is warranted" cannot be made pursuant to 28 U.S.C. § 592(a)(2)(B)(ii).

Attached hereto and incorporated by reference herein are the following Exhibits:

- Exhibit A: An analysis of the "reliance" on and "shifting of responsibility" to accountant defenses.
- Exhibit B: A factual analysis regarding Cisneros' willfulness.
- Exhibit C: An analysis of 28 U.S.C. § 592(a)(2)(B)(ii).

Notwithstanding counsel's attempt to shift the blame for his client's actions, there is substantial, credible and specific information which warrants further investigation. The circumstances of Hernandez's (and anyone else's) conflicting version of events presents precisely the situation where an independent counsel must be given jurisdiction to resolve the matter due to, among other things, the subjective judgments that are

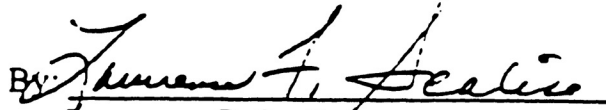
Honorable Janet Reno
February 24, 1997
Page Five

required to be made as to Cisneros' intent. This is especially so given Hernandez's own obvious self-interest and loyalty to Cisneros. Only by an investigation utilizing the full powers of the grand jury will the factual issues surrounding Cisneros' actions and intent be fully, fairly and completely determined.

Thank you for your continued attention to this matter. Should you or the Department require further information or explanation, this Office will provide it.

Very truly yours,

David M. Barrett
Independent Counsel

By: 
Lawrence F. Scalise
Deputy Independent Counsel

Attachments

LFS/jab


cc: Robert S. Litt, Deputy Assistant Attorney General, Criminal Division
Mark E. Matthews, Assistant Attorney General, Tax Division
Stanley F. Krysa, Senior Division Counsel, Tax Division
Mark R. Friend, Deputy Section Chief, Tax Division
Lee J. Radek, Chief, Public Integrity Section

Jo Ann. Farrington, Deputy Chief, Public Integrity Section
Susan J. Park, Trial Attorney, Public Integrity Section

EXHIBIT A

WILLFULNESS AND THE "GOOD FAITH RELIANCE" ON AND "SHIFT OF RESPONSIBILITY" TO ACCOUNTANT DEFENSES

To establish tax evasion under 26 U.S.C. § 7201, the government must show:

1. the existence of a tax deficiency;
2. an affirmative act constituting an evasion of taxes; and,
3. willfulness.

Sansone v. United States, 380 U.S. 343, 351 (1965).

To establish "tax perjury" or filing a false return under 26 U.S.C. § 7206, the government must show that the defendant:

1. made and subscribed a return or other document under penalty of perjury;
2. knew it was not true and correct as to a material matter; and,
3. acted willfully.

United States v. Pomponio, 429 U.S. 10 (1976) (per curiam).

Understatement of income, standing alone, is insufficient to establish either tax evasion or tax perjury. United States v. Doan, 710 F.2d 124, 125 (3d Cir. 1983). There must also be evidence of willfulness. Willfulness is defined as the voluntary, intentional violation of a known legal duty. United States v. Pomponio, 429 U.S. at 11-13. Conduct is not willful if it is the result of negligence, even gross negligence, inadvertence, accident, or mistake, or due to a good faith misunderstanding of the law. Evidence of

iffulness is ordinarily circumstantial. It may be inferred from: "concealment of assets or covering up sources of information, handling of one's affairs to avoid making the

records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or conceal. (emphasis added). Spies v. United States, 317 U.S. 492, 499 (1942).

Thus, there are no limits on the type of conduct from which willfulness can be inferred, and that evidence is admissible of any type of conduct, as long as the "likely effect" of that conduct would be to mislead or conceal. Moreover, willfulness does not require proof of evil motive or bad intent. United States v. Pomponio, 429 U.S. at 12.

In an effort to negate willfulness, taxpayers sometimes assert a "good faith reliance on accountant defense." The essential elements of the reliance defense are:

1. full disclosure of all pertinent facts; and,
2. good faith reliance on the accountant's advice.

United States v. Whyte, 699 F.2d 375, 380 (7th Cir. 1983). Thus, this defense is available only if a defendant:

1. completely and fully disclosed all of the facts to which the advice pertained;
2. the accountant gave the taxpayer advice; and
3. the taxpayer actually and reasonably relied on the advice, which he believed to be correct.

United States v. Brimberry, 961 F.2d 1286, 1290 (7th Cir. 1992), (citing Whyte, 699 F.2d at 380); United States v. Conforte, 624 F.2d 869, 877 (9th Cir. 1980). However, one cannot hide behind advice that one knows or subsequently discovers is wrong or doubts or discovers reason to doubt. United States v. Benson, 941 F.2d 598, 614 (7th Cir. 1991).

Likewise, a taxpayer may defend against a charge that his conduct was willful by asserting that any errors, deficiencies or omissions were the responsibility of the return preparer or bookkeeper. The "shifting responsibility" defense, like the reliance defense, negates the willfulness element. A defendant, however, cannot shift responsibility for admitted deficiencies to the accountant who prepared the return if the taxpayer withholds vital information from, or takes positive action to mislead, the preparer or bookkeeper. United States v. Scher, 476 F.2d 319,321 (7th Cir. 1972), (citing Bender v. Commissioner of Internal Revenue, 256 F.2d 771, 774 (7th Cir. 1958)).

Furthermore, the law is clear that where a defendant attributes underpayment to inefficient bookkeeping and a negligent accountant, the question of willfulness is **not** removed from jury consideration. United States v. Venditti, 533 F.2d 217, 219 (5th Cir. 1976), (citations omitted). Likewise, even good faith reliance on one's accountant is **not** a complete defense to tax evasion. United States v. Chessons, 933 F.2d 298, 304 (5th Cir. 1991), (citing Venditti, 533 F.2d at 219). Thus, the proper test is not whether a taxpayer has a "plausible rebuttal" to evidence that is "prima facially adverse" to his case, but rather, notwithstanding that evidence, can a rational fact finder determine that there is evidence of willful underreporting beyond the approximate standard. See United States v. Doan, 710 F. 2d at 127.

If filing a false return is charged as an act of evasion or a defendant is charged with filing a false return, the defendant must show, notwithstanding any asserted "reliance" or "shift of responsibility" defense, that he adopted and filed the return without having any

reason to believe it is incorrect. See, Whyte, 699 F.2d at 379. Furthermore, intent may be established where the taxpayer decides to keep himself uninformed as to the full extent that the return is inaccurate. United States v. Drape, 668 F.2d 22, 26 (1st Cir. 1982).

When the defendant claims reliance on, and a shift of responsibility to, an accountant, the government need not show that the defendant ordered the accountant to falsify the return. The government can defeat the defense by showing that the defendant (1) was aware of the contents of the return and (2) knew that the reportable income significantly exceeded the amount reported on the return. United States v. Olbres, 61 F.3d 967, 973 (1st Cir.), cert. denied 116 S.Ct. 522 (1995).

Guilty knowledge and willfulness may be inferred from the “handling of one’s affairs to avoid making the record usual in transactions of the kind...,” Ingram v. United States 360 U.S. 672, 677 (1959). Thus, a “reliance” or “shifting responsibility” defense has been held untenable where the taxpayer:

1. Fails to record fees received or to deposit them in an office account thereby making it virtually impossible for his accountant to include them in his tax returns. United States v. Callahan, 450 F.2d 145, 148 (4th Cir. 1971).
2. Keeps irregular books but relies on his bank records to reflect his income where he fails to deposit payments from business customers. United States v. Garavaglia, 566 F.2d 1056, 1059 (6th Cir. 1977). Such conduct was deemed to be a “deceptive practice.” Id.

'Since the taxpayer by his practices has made it impossible for the accountant to accurately prepare the return by effectively withholding information, he cannot reasonably rely on the accuracy of the return (since he knows it cannot contain all income). Such conduct is in and of itself an act of evasion. *id.* and also tends to show that the defendant knew the return was false. A "blind reliance" on accountant defense was rejected in Olbres, 61 F.3d at 970-74, where the government established willfulness by showing, among other things, that the defendants' substantial expenditures were in excess of the amount reported on the return, failed to deposit receipts which they knew were taxable into a business checking account or record the receipts, diverted the unrecorded receipts to other accounts and withheld information from their accountant.

A criminal defendant is only entitled to a "good faith reliance" on or "shift of responsibility" to accountant defense instruction if:

1. the defendant proposes a correct statement of law;
2. the defense has some foundation in the evidence; and,
3. failure to give the instruction would deny defendant a fair trial.

District courts are justified in not giving the instruction where any of the prerequisites are not met. Brimberry, 961 F.2d at 1290. In any event, a proper willfulness instruction has been held sufficient even where a defendant had adduced some evidence in support of the defense(s) since a jury determination of willfulness would necessarily negate any possibility of "good faith." United States v. Kelley, 864 F.2d 569, 573 (7th Cir. 1989).

EXHIBIT B

EVIDENCE OF WILLFULNESS, i.e., STATE OF MIND

The following substantial, specific and credible evidence of willfulness as recognized by the courts, has been established to date:

1. Background and experience of defendant.

Cisneros is highly educated, holding several post-graduate degrees and is financially sophisticated. He was, among other things, a long-term mayor of a major American city, a successful businessman, a bank director, Deputy Chairman of FRB, Dallas, member of Texas Governor's Task Force on Revenue. See Exhibits 1 and 2 attached hereto.

2. Evidence of a consistent pattern of underreporting large amounts of income.

- 1989 - Cisneros understated his gross income in the amount of \$16,000.00, a portion of which went to Medlar. Roberts Affidavit at ¶ F.6.
- 1991 - Cisneros underreported approximately \$126,000.00 in taxable income, according to information gathered by the IRS during its administrative tax investigation. Roberts Affidavit at ¶ G.6.
- 1992 - Cisneros understated his gross income in the amount of \$158,109.00, a portion of which went to Medlar. Roberts Affidavit ¶ H.8. Moreover, Cisneros took an improper \$30,000.00 deduction for a \$30,000.00 distribution from Lincoln Benefit. Roberts Affidavit at ¶ H.7.
- 1993 - Cisneros underreported his gross income in the amount of \$33,531.75. Roberts Affidavit at ¶ I.8.

3. Motive Due to Poor Financial Condition:

Throughout the period 1989 through 1994, Cisneros had a relatively serious cash flow problem which was exacerbated by his making regular cash payments to Medlar. Cisneros also had credit problems evidenced by, among other things, his wife's inability to obtain a certain department store's credit card because of a poor credit history. Cisneros' assets steadily dissipated through this period. Roberts Affidavit at ¶ D.5. Moreover, in late 1992, when Cisneros decided to accept the Cabinet appointment, he knew that his income would be reduced to \$148,000.00 per year. Nevertheless, in order to keep Medlar happy and thus quiet, he continued to pay her and liquidated his assets in early 1993 to do so.

Furthermore, in 1994, Cisneros had to borrow money in order to pay his 1993 taxes. In June, 1994, after the IRS rejected Cisneros' request to pay \$70,625.00 in taxes due via an installment plan, Cisneros borrowed \$100,000.00 from a Texas financial institution and applied \$67,000.87 of the loan proceeds to pay the IRS. Roberts Affidavit at ¶ I.6.

4. The taxpayer signed the returns:

The returns contained a declaration, executed under the penalties of perjury, that the taxpayer "examined th[e] return and its accompanying schedules and states, to the best of the [taxpayer's] knowledge and belief, they are true, correct and complete." When Cisneros signed his 1992 and 1993 returns, filed on April 15, 1993 and April 15, 1994, respectively, he was in poor financial condition, as outlined above. His signing of the returns permits the inference that he read his return and knew their contents.

Cisneros knew that substantial amounts of income were received by him from October, 1992 through December, 1992. Investigation to date has revealed that Cisneros did not report income in the amount of \$75,364.00 during this period and that at least \$28,500.00 went to Medlar. Roberts Affidavit at ¶ H.5.

During the February 20, 1997 meeting with Department officials, Namorato provided a document entitled, "Analysis of Medlar Deposits" (p. 2), further identified as Ex. 2, listing \$28,400.00 funds paid to Medlar which were not declared as income by Cisneros. The document states that bank statements

were "not available." As set forth below, on April 4, 1995, Hernandez was told by Cisneros and his employees that any income received by Cisneros after early October, 1992, was de minimus and that he (Hernandez) asked for but never received bank statements for that period.

5. Failure to supply an accountant with accurate and complete information and conducting financial affairs so as to preclude accountant from learning of income:

- a. During a telephonic conversation between Cisneros and Medlar on December 30, 1992, which she tape recorded, Cisneros purportedly made the following statement regarding the taxation of money he was giving her:

Medlar: "Don't panic, they didn't say anything about the money?"

Cisneros: "No, but I talked to Sylvia and she said that they talked to Luis Hernandez, the accountant and asked him today whether he knew of any payments and he said no, he did not because he does not, he doesn't get involved in that, he accounts for the money we put into the system and the money that I help you with comes before that, comes out before it gets to him." (emphasis added). Roberts Affidavit at ¶ H.6.b.

- b. Based on a deposit analysis to ascertain sources of funds, SA Roberts calculated that Cisneros did not report income in the amount of \$75,364.00 for the last three months of 1992.

This figure encompasses speaking fees and taxable travel reimbursements. Cisneros deposited additional funds received totaling \$11,564.00 in the last three months of 1992.

Cisneros utilized at least \$28,500.00 to make payments to Medlar during the months of October, November and December, 1992.

Hernandez made the following statements regarding the preparation of Cisneros' 1992 tax return:

- i. Hernandez stated that he used the "deposit method" to calculate Cisneros' Schedule C Income in 1992 as all deposits were treated as income. (FBI SAs George Parks and Claude Martin January 26, 1995, interview of Hernandez in San Antonio, Texas);
- ii. Hernandez stated that he was unaware of any deposits/income after the first week of October, 1992. (IRS SAs Barrows and Lange April 4, 1996, interview of Hernandez in San Antonio, Texas);
- iii. Cisneros advised Hernandez that he did not give any lectures after the first part of October, 1992, because he was involved with the Clinton Presidential campaign and that the only income received after the first part of October would be de minimis. (IRS SAs Barrows and Lange April 4, 1996, interview of Hernandez in San Antonio, Texas);
- iv. Hernandez requested from Cisneros and his employees, bank statements for the end of 1992; however, he never received any. (IRS SAs Barrows and Lange April 4, 1996, interview of Hernandez in San Antonio, Texas). Roberts Affidavit at ¶ H.4;
- v. Hernandez advised that he did not fear that income checks were not being deposited since he had been told by Cisneros that all income checks were deposited. (IRS SAs Barrows and Lange April 4, 1996, interview of Hernandez, in San Antonio, Texas). Roberts Affidavit at ¶ H.5;
- vi. **Numerous income checks were not deposited into Cisneros' business accounts but rather were cashed and deposited into Medlar's accounts. This practice became the norm beginning in October, 1992, and Cisneros thereafter denied the receipt of income to his accountant and did not provide him with bank statements;**

- vii. Hernandez stated that Cisneros, Ramirez and Arce-Garcia all told him that the \$2,500.00 Lincoln Benefit monthly payment was for a retirement plan. (IRS SAs Barrows and Lange, October 19, 1996. Interview of Hernandez.); and
- viii. Hernandez made the following statements regarding distributions made from Cisneros' Mass Mutual Accounts: Hernandez was not told by Secretary Cisneros of any distributions from Mass Mutual or (Lincoln Benefit) in 1993, nor did he receive any form 1099s for these accounts from Cisneros. (IRS SAs Barrows and Lange, October 19, 1996, interview of Hernandez).

6. Engaging in suspicious cash transactions and the use of nominees:

- a. Cisneros "structured" two payments of \$8,000.00 to Medlar's Broadway National Bank account on December 16, 1992, and December 18, 1992, both of which Sylvia Arce-Garcia, an employee of Cisneros, deposited into this account.¹ Cisneros knew that he would be subject to a FBI background investigation in connection with his HUD appointment when these payments occurred. Medlar used the \$16,000.00 to purchase a new home in Lubbock, Texas. This house was purchased by Medlar via "straw-borrowers," namely, Medlar's sister, Patsy J. Wooten, and her husband, Allen R. Wooten, in violation of 18 U.S.C. §§ 1014 and 1344. Cisneros was aware that the house was not being purchased in Medlar's name. The house was ostensibly purchased in the Wooten name in order to, among other things, conceal Cisneros' connection with the transaction. Medlar purchased the house with the understanding that Cisneros' funding would enable her to pay off the bank's lien. In March, 1995,

¹ On December 31, 1992, Arce-Garcia denied knowledge of payments from Cisneros to Medlar during Cisneros' background investigation.

after the Cisneros payments stopped. Medlar, through her relatives, was forced to sell the house; and

- b. On February 26, 1991, Ramirez, at the direction of Cisneros, deposited \$12,000.00 into Medlar's bank account at Broadway National Bank, account number [REDACTED]. According to Medlar's bank records, this was the first payment Cisneros made to Medlar that exceeded \$10,000.00. Because the deposit was made in cash and exceeded \$10,000.00, Broadway National Bank, pursuant to federal law, filed a CTR with the IRS regarding this transaction. A review of the CTR revealed that Ramirez did not disclose the fact that the deposit was made on behalf of Cisneros, i.e., there is no information contained within the CTR that links Cisneros to the deposit. Nevertheless, from that day forward, all additional payments from Cisneros to Medlar were made in increments of less than \$10,000.00 to, *inter alia*, avoid the creation of CTRs and to ensure the payments would be kept secret.

7. Extensive use of currency/checks cashed and currency deposited in "out of town" accounts:

Virtually all funds paid to Medlar, a significant portion of which were undeclared, were made in the form of currency.

Checks were cashed at Cisneros' bank and deposited into Medlar's account at a different bank. Furthermore, Cisneros, a highly visible person in San Antonio, did not conduct the majority of the transactions. Cash transactions, while not impossible to detect, are difficult to track.

8. False statements to agents, false exculpatory statements, whether made by a defendant or initiated by him, and any conduct in which a tax evasion motive played any role, even if the conduct also served another purpose such as concealment of another crime:

- a. IRS SAs Kesha Lange and Dorman Barrows interviewed Secretary Cisneros in the presence of counsel in Washington,

D.C. on January 26, 1995. At that time, Cisneros knew not only that the IRS was investigating whether he paid federal income taxes on his income, including funds paid to Medlar, but that DOJ was conducting a preliminary investigation to determine whether his conduct with respect to Medlar warranted the appointment of an Independent Counsel. The IRS report of the interview provides in pertinent part:

Cisneros stated he was **“meticulous, scrupulous and uncompromising in making sure that everything was reported for taxes.”** To the best of his knowledge, all of his income was reported on his income tax returns for the years 1989 to 1993.

IRS Report of SAs Lange and Barrows, p.6 (emphasis added).²

It can be inferred from his January 26, 1995, statement that Cisneros:

- i. **was intimately involved in the recordation of income/expenses at his business and the preparation of his tax returns;**
- ii. **insured no mistakes were made;**
- iii. **nothing was undeclared; and**
- iv. **no funds paid to Medlar were unaccounted for and thus undeclared as income.**

At that time Cisneros didn't say:

²These apparently false statements made on January 26, 1995, are consistent with Secretary Cisneros' false statements to the FBI made two years earlier on January 7, 1993. In that January 7, 1993, interview, Secretary Cisneros told the FBI: (1) that he paid taxes on all receipts he received in connection with his communication (speech) business; and (2) that he paid federal, state and local taxes on all monies he received. Roberts Affidavit at ¶ D.10.)

- i. turned over/left tax matters to CPA and/or any employees;
- ii. that the CPA gave him advice;
- iii. that he actually relied on it;
- iv. that he had no reason then or later to know it to be incorrect or doubt it; and
- v. CPA in effect left to his own devices.

In sum, Cisneros did not assert his "reliance" on Hernandez nor did he attempt to "shift responsibility" to him. For him to do so now is **inconsistent, evidence of a guilty mind and further evidence of willfulness.**

- b. Cisneros' then employees, Arce-Garcia, Rosales and Ramirez all concealed information from the FBI during Cisneros' background investigation. They were all ostensibly rewarded with government jobs. Without their participation in the initial concealment and its subsequent cover-up, Cisneros could not have obtained and kept his cabinet post. They have already demonstrated their willingness to lie on Cisneros' behalf.

Any continued concealment by these three individuals not only protects Cisneros, it also protects themselves from liability for their original concealment. Thus, these individuals have even more of a motive to lie now than before.

Furthermore, these individuals, all of whom continue to be closely associated with Cisneros and ostensibly involved in a joint-defense, have asserted their Fifth Amendment rights during the OIC investigation.

While this assertion cannot be used against them in any proceeding, it is neither improper nor unfair to use it as a factor in assessing their credibility with respect to the issue of

Cisneros' willfulness. While it is proper for them to assert their privilege as a shield, it would be incongruous to give Cisneros the benefit of that shield as well. Their use of the privilege would, in effect, be used as a sword to selectively provide information in a form only beneficial to Cisneros.

- c. Hernandez has made a number of conflicting statements concerning, among other things:
 - i. how he calculated Cisneros' income;
 - ii. when he became aware of payments made by Cisneros to Medlar;
 - iii. when he was aware of funds not being deposited by Cisneros; and
 - iv. whether he was provided with accurate and complete financial information.
-

[REDACTED]

[REDACTED]

page Redacted

~~_____~~

~~_____~~

Page Redacted

page redacted

[REDACTED]

[REDACTED]

page redacted

HEARING
BEFORE THE
COMMITTEE ON
BANKING, HOUSING, AND URBAN AFFAIRS
UNITED STATES SENATE
ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

NOMINATION OF HENRY CISNEROS, TO BE SECRETARY, DEPARTMENT
OF HOUSING AND URBAN DEVELOPMENT

JANUARY 12, 1993

Printed for the use of the committee on Banking, Housing, and Urban Affairs



EXHIBIT 2

U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1993

64-100 CC

For sale by the U.S. Government Printing Office

Supplies and all other materials furnished by the U.S. Government Printing Office

ISBN 0-16-040350-6

CONTENTS

JANUARY 12, 1993

Opening statement of Chairman Hicglo	1
Prepared statement	7
Opening statements, remarks, or prepared statements by:	
Senator D'Amato	10
Prepared statement	10
Senator Sarbanes	10
Prepared statement	10
Senator Dodd	10
Prepared statement	10
Senator Stennis	10
Prepared statement	10
Senator Shelby	10
Senator Boxer	10
Senator Moseley-Braun	10
Prepared statement	10
Senator Murrin	10
Senator Mack	10
Prepared statement	10
Senator Faircloth	10
Senator Hennick	10
Senator Domenici	10
Senator Kerry	10
WITNESSES	
Senator Lloyd Denton	2
Senator Phil Gramm	2
Jack Kemp, Secretary, Department of HUD	2
Prepared statement	2
Jose F. Serrano, U.S. Representative in Congress	2
NOMINEE	
Secretary Designee Henry Cisneros	16
Prepared statement	16
Biographical sketch of nominee	16
Biography of nominee	16
ADDITIONAL MATERIAL SUPPLIED FOR THE RECORD	
Letter dated January 8, 1993, to President-Elect Clinton from Senators Hicglo, Hiden, Kerry, Kennedy, Wofford, and Dodd	17
Letter dated January 11, 1993, to President-Elect Clinton from Senators Hicglo and Sarbanes	17
Newspaper article, USA Today, January 11, 1993	17
Mortgage Insurance Companies of America	17
National Recreation and Park Association	17
American Planning Association	17
Public Housing Authorities Directors Association	17

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS

DONALD W. RIEGLE, JR., Michigan, *Chairman*
 ALFONSO M. DAMATO, New York
 PHIL GRAMM, Texas
 CHRISTOPHER B. DODD, Missouri
 CONNIE MACK, Florida
 LAUCH FAIRCLOTH, North Carolina
 ROBERT F. BENNETT, Utah
 WILLIAM V. ROY, Jr., Delaware
 PETER V. DOMENICI, New Mexico
 STEVEN B. HAUSER, Staff Director and Chief Counsel
 HOWARD A. MENZEL, Republican Staff Director
 RALPH J. KATZ, Staff Director/Subcommittee on
 Housing and Urban Affairs
 PAMELA RAY STURM, Counsel
 EDWARD M. MALAN, Editor

(iii)

Include below all memberships and offices held in professional, fraternal, civic, charitable and other organizations.

Members:

History.

[illegible]

Employment record: List below all positions held since college, including the title or description of job, name of employer, location of work, and dates of inclusive employment.

ELIGIBILITY OF PRESIDENTIAL NOMINEES

can and create the power of information technology.

Name	Henry	Cabriel
138 L28	Henry	Cabriel
Position to which nominated:	Secretary, Housing Urban Development	12/11/72
Date of birth:	9/11/47	Place of birth: San Antonio, TX, Bessar Codat
Married status:	Married	Full name of spouse: Mary Alice Perez Cisneros
Name and age of children:	[REDACTED]	
Education:	John Paul Cimarron, 5	
	Institution	Dates attended
	Central Catholic High	1960-64
	Texas A&M University	1964-68
	Texas A&M University	1968-70
	Harvard University	1972-73
	Mass. Inst. Technology	1973-74
	George Washington Univ.	1979-71
	Degrees received	Date of degree
	Diploma	1964
	Bachelor Arts	1968
	Master Urban	1970
	Regional Planning	
	Master Public Administration	1973
	None	N/A
	DPA, Public Administration	1976
Person and source	<p>List below all scholarships, fellowships, honorary degrees, military medals, honorary society memberships, and any other special recognitions for outstanding service or achievement.</p> <p>Sept 1972 - June 1973 Ford Foundation Grant Recipient John F. Kennedy</p> <p>School of Government, Harvard University</p> <p>Sept 1971 - Sept 1972, White House Fellow/ Office of the Secretary of Health, Education, and Welfare, Washington, DC</p> <p>See Attached -- For Honorary Degrees, etc.</p>	

Form 100-10
Experience

any experience in or direct association with Federal, State, or local governments, including any advisory, consultative, honorary or other part-time service or positions.

SEE ATTACHED - Professional Record

Books
References

List the titles, publishers and dates of books, articles, reports or other published materials you have written.

San Antonio Place in the Technology Economy: A Review of Opportunities and a Blueprint for Action. Authored by Henry Cisneros; September 1993.

Target '98: Goals and Decisions for San Antonio's Future. Drafted by Mayor Henry Cisneros, July 1993.

A Survival Strategy for American Cities. Lecture, City Club of New York, February 1992.

Daily Radio Commentary, 40 Radio Stations. Produced by Tichenor Broadcasting, 1989-1992

Most, Texas. Television Program, 20 markets in Texas. Produced by Phillips Productions, 1989-1992

Local
Members
of activities

List all memberships and offices held in and services rendered to all political parties or election committees during the last 10 years.

CO-CHAIR, Ann Richards Governor's Campaign 1990

CHAIR, [REDACTED]

Tab
Contributions

List all political contributions of \$500 or more to any individual, campaign, committee, political party, political action committee or similar entity during the last eight years and identify the specific amounts, dates and names of the recipients

SEE

Qualifications

List fully your qualifications to serve in the position to which you have been named. (attach sheet)

San Antonio and "Professional Record"

Future employment
relationships:

1. Indicate whether you will sever all connections with your present employer, business firm, association or organization if you are confirmed by the Senate.

Will comply with OGE Guidelines

2. As far as can be foreseen, state whether you have any plans after completing government service to resume employment, affiliation or practice with your previous employer, business firm, association or organization.

None on file

3. Has anybody made you a commitment to a job after you leave government?

No

4. Do you expect to serve the full term for which you have been appointed?

Yes

of interest:

Obtain any financial arrangements or deferred compensation agreements or other continuing dealings with business associates, clients or customers who will be affected by policies which you will influence in the position to which you have been nominated.

It is unlikely that any of my business associates and their clients will be affected by HUD policies. Nevertheless, I have submitted a personal commitment letter to the ethics officer at HUD which has been approved by HUD and by the Office of Government Ethics.

2. List any investments, obligations, liabilities, or other relationships which might involve potential conflicts of interest with the position to which you have been nominated.

It is unlikely that any of my investments, obligations, liabilities or other relationships will involve potential conflicts of interest. Nevertheless, I have submitted a personal commitment letter to the ethics officer at HUD which has been approved by HUD and by the Office of Government Ethics.

3. Describe any business relationship, dealing or financial transaction (other than the payee) which you have had during the last 10 years with the Federal Government, whether for yourself, on behalf of a client, or acting as an agent, that might in any way constitute or result in a possible conflict of interest with the position to which you have been nominated.

NONE. I have submitted a personal commitment letter to the ethics officer at HUD which has been approved by HUD and by the Office of Government Ethics. This personal commitment letter relates to efforts I will undertake to remove myself from any possible conflict of interest, the creation of a voting trust for stock, and removal procedures.

4. Criminal and disciplinary actions:

1. List any lobbying activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat or modification of legislation at the national level of government or affecting the administration and execution of national law or public policy.

While Mayor and President of the National League of Cities I conferred with Congress on legislative issues.

3. Explain how you will resolve any potential conflict of interest that may be disclosed by your responses to the above items.

N/A

1. Give the full details of any civil or criminal proceeding in which you were a defendant or any inquiry or investigation by a Federal, State, or local agency in which you were the subject of the inquiry or investigation.

NONE

2. Give the full details of any proceeding, inquiry or investigation by any professional association including any bar association in which you were the subject of the proceeding, inquiry or investigation.

NONE

ORGANIZATIONS

ALBUQUERQUE - SAN ANTONIO

General Chair, San Antonio Target '90, 1983-89
 President, Greater Austin-San Antonio Corridor Council, Inc.,
 1983
 Chairman, Fire & Police Pension Fund, 1981-89
 Chairman, San Antonio Education Fund, 1989-Present
 Chairman, Stadium Advisory Committee, Alamodome, 1989-Present

TEXAS & NATIONAL AFFILIATIONS

Past President, National League of Cities, 1986
 Past President, Texas Municipal League, 1983
 Member, Council on Foreign Relations, New York, 1983-Present
 Member, President's National Bipartisan Commission on Central
 America, 1983-84

ORGANIZATIONS - Continued

Trustee, Notre Dame University, 1983-1988
 Member, Board of Regents, Texas A&M University System, 1983-87
 Co-Chair, Texas Response to the 1983 Mexico Earthquake, 1983
 Member, Bilateral Commission on the Future of U.S. - Mexican
 Relations, Ford Foundation, 1984-1989
 Member, Board of Trustees, Baylor College of Medicine, 1987-
 Present
 Member, InterAmerican Dialogue, 1989-Present
 Member, Rockefeller Foundation, Board of Trustees, 1989-
 Present
 Chairman, National Civic League, 1989-Present
 Member, Governor's Task Force on Education Finance in Texas,
 1989
 Board Member, Texas Rivera Center, Claremont, California,
 1989-Present
 Board Member, National Endowment for Democracy, 1990-Present
 Deputy Chairman, Federal Reserve Bank of Dallas, 1991-Present
 Member, Governor's Task Force on Revenue, 1991
 Board Member, The American Assembly, 1991- Present
 Board Member, Lyndon B. Johnson Foundation, 1991-Present
 Co-Chair, National Hispanic Leadership Agenda, Present
 Member, Commission on America in the New World, Carnegie
 Institute of International Peace

1984

Chairman, Cisneros Asset Management Company (Investment firm managing \$150 million in fixed income accounts); Chairman, Cisneros Benefit Group (Investments, group health, and insurance planning); Chairman, Cisneros Communications (Television program and radio commentary).

1981 - May 1989

Elected Mayor of San Antonio; Re-elected 1983 - Margin of Victory 94.3% of vote; Re-elected 1985 with 73% of vote; Re-elected 1987 with 67% of vote.

1975 - May 1981

Member, City of San Antonio, City Council; Re-elected 1977 and 1979.

1974 - Jan 1987

Faculty Member, Public Administration program, University of Texas at San Antonio; Faculty Member, Department of Urban Studies, Trinity University

1972 - Aug 1974

Ford Foundation Grant Recipient John F. Kennedy School of Government, Harvard University; Teaching Assistant, Department of Urban Studies and Planning, Massachusetts Institute of Technology.

Sept 1971 - Sept 1972

White House Fellow/Office of the Secretary of Health, Education, and Welfare, Washington, D.C.

Jan 1970 - Sep 1971

Assistant to the Executive Vice President, National League of Cities, Washington, D.C.

Jan 1969 - Jan 1970

Assistant Director, Department of Model Cities, San Antonio, Texas

Sept 1969 - Jan 1969

Administrative Assistant, Office of the City Manager, Bryan, Texas

May 1968 - Sept 1969

Administrative Assistant, Office of the City Manager, San Antonio, Texas

use Policy, 1971-73
 Outstanding Young Men of San Antonio Jaycees, 1976
 50 "Five Outstanding Young Texans" Texas Jaycees, 1974
 One of "Ten Outstanding Young Men of America" U.S. Jaycees, 1982
 Torch of Liberty Award, Anti-Defamation League of B'nai B'rith, 1982
 Jefferson Award, American Institute of Public Service, 1983
 Childs Lecture on Urban Affairs, City Club of New York, 1982
 Distinguished Leadership Award, American Institute of Planners, 1983
 Honorary Member, American Institute of Architects, 1984
 National Recognition Award by the Mexican Government for 1985
 Earthquake Assistance
 Outstanding Mayor "All Pro" City Financial Team, City and State Magazine, 1986
 1987 Leadership in Local Government Award, American City & County Magazine, 1987
 President's Award, National League of Cities, 1989

VIRILITY HONORARY DEGREES

Honorary Doctor of Laws, University of Maryland, Baltimore 1992
 Honorary Doctor of Laws, Texas Tech University, 1982
 Honorary Doctor of Laws, Incarnate Word College, 1983
 Honorary Doctor of Laws, George Washington University, 1984
 Honorary Doctor of Laws, Austin College, 1984
 Honorary Doctor of Laws, Claremont College 1985
 Honorary Doctor of Humanities, Webster College 1985
 Honorary Doctor of Laws, City College of New York, 1986
 Honorary Doctor of Humane Letters, Arizona State Univ, 1986
 Honorary Doctor of Letters, State University of New York, Oneonta, 1987
 Honorary Doctor of Humane Letters, Mount Holyoke College, 1988
 Honorary Doctor of Laws, Williams College, Massachusetts, 1988
 Honorary Doctor of Laws, Chicago Theological Seminary, 1988
 Honorary Doctor of Laws, Kenyon College, 1989
 Honorary Doctor of Laws, Marshall University, 1989
 Honorary Doctor of Business Administration, Bryant College, Rhode Island, 1991
 Honorary Doctor of Humanities, Jersey City State College, 1991
 Honorary Doctor of Laws, University of Wisconsin, Green Bay, 1992

STAR RECORD

Distinguished Military Graduate, Texas A&M University
 Commissioned Officer, U.S. Army, Infantry, 1968
 Captain, U.S. Army Reserves, (Resigned, 1978)

ADDITIONAL INTEREST

Interviewed by Democratic Presidential Nominee as a Potential Vice President Candidate, 1984.
 Asked by Vice-President George Bush to assist in briefing Soviet General Secretary Mikhail Gorbachev during 1987 Summit Meeting.
 Chaired the Hispanic Agenda Project in 1987-88 designed to define the common policy interests of the nation's Hispanic population.

UNITED STATES SENATE
 COMMITTEE ON BANKING, HOUSING AND
 URBAN AFFAIRS
 WASHINGTON, DC 20510-6010

United States Senate

COMMITTEE ON BANKING, HOUSING AND
 URBAN AFFAIRS
 WASHINGTON, DC 20510-6010

January 8, 1993

President Elect Clinton
 Clinton-Gore Transition
 105 West Capitol Ave., Suite 400
 Little Rock, AR 72201

Dear President Elect Clinton:

As members of the Senate Task Force on Community and Urban Revitalization, we have worked together over the past year to encourage Congress and the Administration to do more for the needs of our urban centers.

As part of our efforts, Congress included in P.L. 102-368, the Supplemental Appropriations, Transfers and Reversions Act of 1992, an appropriation of \$500 million for grants to rejuvenate neighborhoods and promote economic opportunity. The text of this provision is enclosed. Up to \$400 million is available for an "Enterprise Community Block Grant Demonstration Program" and up to \$200 million for the "National Public/Private Partnership Program." The expenditure of these appropriated funds, however, was made contingent upon enactment of separate authorizing legislation.

Such authorizing legislation was approved by Congress in October as part of the enterprise zone provisions of H.R. 11, the omnibus tax bill. But, because the bill was vetoed, the funds made available by P.L. 102-368 cannot be obligated.

The violence in South-Central Los Angeles last May highlighted the severe and persistent problems that exist in communities throughout the nation. A federal response is needed. Constructive efforts, however, have been caught in the gridlock in Washington over the last several years. The funds provided by P.L. 102-368 are one such example.

EXHIBIT C

ANALYSIS OF 28 U.S.C. § 592(a)(2)(B)ii (STATE OF MIND)

28 U.S.C. § 592(a)(2)(B)(ii) provides as follows:

- (2) Limited authority of Attorney General. -- (A) In conducting preliminary investigations under this chapter, the Attorney General shall have no authority to convene grand juries, plea bargain, grant immunity, or issue subpoenas.

(B)(ii) **The Attorney General shall not base a determination under this chapter that there are no reasonable grounds to believe that further investigation is warranted, upon a determination that such person lacked the state of mind required for the violation of criminal law involved, unless there is clear and convincing evidence that the person lacked such state of mind. (emphasis added).**

Thus, in making a determination not to expand an independent counsel's jurisdiction pursuant to 28 U.S.C. § 593(c)(2)(A), the Attorney General must find "clear and convincing evidence" of the subject's lack of criminal intent. This "state of mind" provision was added to the statute when it was amended in 1987 because of the Department's then practice to decline to appoint an independent counsel due to a lack of evidence of criminal intent. While the statutory standard then was the same as it is now, whether there are "reasonable grounds to believe that further investigation is warranted," the Attorney General had used a different standard to decide on the need for an Independent Counsel in two matters: "whether, based on the evidence collected during the preliminary investigation, the case offered a 'reasonable prospect of conviction.'" S. Rep. No. 100-123, 100th Cong., 1st Sess. 1987, reprinted in 1987 U.S.C.C.A.N. 2150 (Re P.L. 100-191 Independent Counsel Reauthorization Act of 1987.) The legislative history makes it clear that the Attorney General was prohibited:

in cases where there is '**conflicting or inconclusive evidence**' on the subject's state of mind, from refusing to conduct a preliminary investigation or to apply for the appointment of an independent counsel solely because the subject of the investigation 'lacked the state of mind' required to prove a criminal violation. (emphasis added). S. Rep. No. 100-123.

The underlying rationale was (and is) that:

States of mind are inherently difficult to prove, particularly when the investigator is prohibited from using such tools as grand juries and subpoenas. **Even after a full investigation, determination of a person's state of mind often necessitates the type of subjective judgments which should not be made by the Attorney General, in light of the limited role reserved for the Department of Justice in the independent counsel process. For these reasons, questions about a subject's state of mind, unless the answer is without dispute, should not play a decisive role in the Attorney General's determination to close a case under the statute.**

It is theoretically possible that the Attorney General would have a case in which the evidence disproving criminal intent is so compelling that it justifies closing the entire matter. The provision thus leaves open the possibility of discontinuing a case due to evidence clearly disproving a criminal state of mind. **However, in the more common situation where there is conflicting or inconclusive evidence on the subject's state of mind, the provision prohibits the Attorney General from closing the case solely because he or she has evaluated the evidence and found the evidence against intent more persuasive or the evidence establishing intent insufficiently strong. The provision requires that, in such cases, the Attorney General must leave that issue to an independent counsel. (emphasis added). S. Rep. No. 100-123**

In 1994, when Congress reconsidered the reimplementation of the Independent Counsel Act, it again considered "state of mind" and reached the same conclusion:

Conference agreement

The conference agreement follows the House bill. Congress believes that the Attorney General should rarely close a matter under the independent counsel law based upon finding a lack of criminal intent, due to the subjective judgments required and the limited role accorded the Attorney General in the independent counsel process.

Congress also believes that at least one Attorney General abused his authority in this area, that this abuse was the impetus for the statutory restriction in the expired law, and that a statutory restriction remains necessary to prevent future problems. (emphasis added). **H.R. Conf. Rep. No. 103-511.**

103rd Cong., 2d Sess. 1994. reprinted in 1994 U.S.C.C.A.N. 792. (Re: P.L. 103-270 Independent Counsel Reauthorization Act of 1994.)¹

Both the statutory standard and the legislative history are clear: the Attorney General cannot and should not decline to confer jurisdiction on an independent counsel where the subject's criminal intent is unclear. The subjective judgments necessary in determining intent must be left to an independent counsel.

¹ The proposed House amendment of the 1994 Independent Counsel Act followed the 1987 law. **H.R. Conf. Rep. No. 103-511.** (Re: P.L. 103-270 Independent Counsel Reauthorization Act of 1994.) The proposed Senate bill would have permitted the Attorney General to close a matter after either a threshold inquiry under section 591(d) or a preliminary investigation under section 592, if the Attorney General determined there were "no reasonable grounds to believe that the subject acted" with criminal intent and "no reasonable possibility that further investigation would develop such evidence." **H.R. Conf. Rep. No. 103-511**

FILED FEB 28 1997

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
INDEPENDENT COUNSEL DIVISION

Special Division

In re Henry G. Cisneros

)
)
)

No. ~~95-1~~ 95-1

NOTIFICATION TO THE COURT PURSUANT TO 28 U.S.C. § 592(a)(1)
OF THE INITIATION OF A PRELIMINARY INVESTIGATION,
APPLICATION TO THE COURT PURSUANT TO 28 U.S.C. § 593(c)(1)
FOR THE EXPANSION OF THE JURISDICTION OF AN INDEPENDENT COUNSEL
AND OPPOSITION TO REQUEST FOR REFERRAL OF RELATED MATTER

In accordance with the Independent Counsel Reauthorization Act of 1994, I hereby notify the Special Division of the Court that on January 29, 1997, I commenced a preliminary investigation pursuant to the request of Independent Counsel David M. Barrett for an expansion of his jurisdiction to investigate, and, if appropriate, to prosecute any violations of federal criminal law, other than a Class B or C misdemeanor or infraction, by former Secretary of Housing and Urban Development Henry G. Cisneros,¹ with respect to certain of Mr. Cisneros's income tax obligations for tax years 1989 and 1991 through 1993. I have completed the abbreviated 30-day preliminary investigation provided for under the Act, 28 U.S.C. § 593(c)(2), and have given great weight to the views of the Independent Counsel. I have concluded that an expansion of Mr. Barrett's jurisdiction is appropriate for tax year 1992. I further have determined that there are no

¹Pursuant to 28 U.S.C. § 591(b)(7), Mr. Cisneros remains a covered person under the provisions of the Independent Counsel Act for one year after leaving his position as Secretary. Mr. Cisneros's last day in office was January 20, 1997.

reasonable grounds to believe that further investigation is warranted for tax years 1989, 1991 and 1993.

Background. On March 13, 1995, I caused to be filed an "Application to the Court Pursuant to 28 U.S.C. § 592(c)(1) for Appointment of an Independent Counsel" (Attorney General's Application) requesting that this Court appoint an Independent Counsel to investigate and if appropriate prosecute allegations that former Secretary Cisneros made false statements to the FBI with respect to the amount and timing of payments he had made to his former mistress, Linda Medlar. In addition, the filing included a Notification to the Court pursuant to section 592(b)(1) that the preliminary investigation had failed to develop any evidence of any income tax violations by Mr. Cisneros, and concluded as a result that further investigation of whether or not there had been any tax violations in connection with this matter was not warranted.

The Special Division appointed Independent Counsel David M. Barrett to investigate whether Mr. Cisneros should be prosecuted for his alleged false statements concerning his payments to Ms. Medlar as described in the Application of the Attorney General. The Independent Counsel has informed me that as part of his investigation he has investigated Mr. Cisneros's finances in detail, including "all funds received by Cisneros between 1989-1993" and tax return information obtained from the Internal Revenue Service (IRS), and has now concluded that

Mr. Cisneros may have failed to report income for tax years 1989, 1991, 1992 and 1993.

In simultaneous requests, he has requested that I seek an expansion of his jurisdiction to include income tax violations relating to funds specifically used to make payments to Ms. Medlar² (Letter from Independent Counsel Barrett to Attorney General Janet Reno of January 28, 1997), and that this Court refer to him as related matters income tax violations that do not relate to funds used to make payments to Ms. Medlar (Sealed Application for the Referral of Related Matters Pursuant to 28 U.S.C. § 594(e) (Sealed Application)).

As will be explained in more detail below, it is impossible to parse out jurisdictional responsibility for tax violations as Mr. Barrett suggests. Because an investigation of a tax violation is based on an audit or analysis of all reportable income, allowable deductions, and taxes due and owing for a particular year, and not solely on the basis of particular items or deductions, it is not meaningful or practical to analyze these matters in terms of "Medlar-Related Income" and "non-Medlar Related Income." This is all the more so in this case where the individual items of income have allegedly been used in part to make payments to Ms. Medlar and in part for other purposes. This Notification to the Court therefore discusses and resolves the totality of Mr. Barrett's request. It is my conclusion, as more

² The Independent Counsel refers to this as "Medlar-Payment Income," a phrase that will also be used herein for ease of reference.

fully described below, that based on the record available to the Department of Justice at this time, further investigation is warranted for tax year 1992 alone.

Given the unique procedural posture of this matter, which also will be discussed below, it is possible that through the normal course of the IRS's administrative procedures, additional information will become available in the future to the Department of Justice that might alter this conclusion. That possibility is expressly contemplated in the Independent Counsel Act, 28 U.S.C. § 592(c)(2), and should it occur, I will reassess my current conclusions at that time.

The Procedural Posture of this Matter. It came to the attention of the Department of Justice, during the course of the first preliminary investigation of Mr. Cisneros in late 1994, that agents of the IRS were inquiring into Mr. Cisneros's tax situation. It now appears, as reflected in documents provided and representations made by the Independent Counsel, that these agents have concluded their review.

It is the understanding of the Department of Justice that the agents' recommendation is now under administrative review by the Chief Counsel's Office of the IRS, pursuant to the standard procedures followed in any tax matter. The purpose of that review is to examine closely the factual and legal sufficiency of the case, and to apply the established enforcement policies of the IRS to the particular facts of the case. Following that review, depending on the facts of the case, the IRS may determine

that the case has no merit; that the case has merit but should be resolved through the civil enforcement authority of the IRS; or that the case should be referred to the Department of Justice for consideration for criminal investigation or prosecution. In the ordinary course of events, the Department would assess the matter at that time based on a full development of the facts and the professional views of the IRS with respect to these tax matters.

In spite of the fact that the Independent Counsel appears to have been aware of the administrative posture of the matter, at the very time the final IRS review was underway, he chose to seek this expansion of jurisdiction from the Department of Justice, thereby forcing, because of the extremely compressed timetable of section 593(c)(2), a review of this matter without fully developed facts and without the benefit of the expertise of the IRS. Although it was proposed to the Independent Counsel's Office that this request for expansion be withdrawn to permit the administrative process to come to completion, allowing consideration of this matter based on a properly developed tax record, the Independent Counsel's Office declined.

While I might have prematurely terminated the administrative review by requesting that the IRS refer this matter to me now, pursuant to the provisions of 26 U.S.C. § 6103(h)(3)(B), thereby obtaining some insight into the factual materials developed by the IRS, that option would have had the effect of terminating the review process. The Department of Justice has considerable respect for and takes great care to avoid interfering with the

administrative processes of the IRS, and I have concluded that it would be inappropriate for me to do so here. I recognize that as a result, it may be necessary for me to reconsider my conclusions reached here at some point in the future, should the IRS conclude that referral of this matter to the Department of Justice for consideration of criminal prosecution is warranted. However, I have concluded that accepting that possibility and letting the administrative process proceed to its natural conclusion is the best course at this time.

FACTS AND ANALYSIS

I. Tax Year 1989

The Allegation and Information Received. The evidence suggests that during tax year 1989, Mr. Cisneros received an \$80,000 check from First Gibraltar, F.S.B., a Texas Bank. Mr. Cisneros had entered into a contract with First Gibraltar, which provided that he would be paid that amount for consulting services. Bank deposit records establish that when this check was negotiated, \$64,000 was deposited into two Cisneros bank accounts, a personal account and a business account; it appears that the remaining \$16,000 was received back in cash. Tax records suggest that only \$64,000 was declared on Mr. Cisneros's 1989 tax return as income. The Independent Counsel alleges that the remaining \$16,000 was undeclared and was income to

Mr. Cisneros, and that Mr. Cisneros therefore evaded taxes on the \$16,000 of undeclared income.³

The Results of the Preliminary Investigation. Mr. Cisneros's 1989 tax return was prepared by an accountant named Rene Gonzalez. In the course of the preliminary investigation, Mr. Gonzalez's work papers were examined, the results of previous interviews of Mr. Gonzalez were reviewed, and Mr. Gonzalez was reinterviewed.

The work papers clearly establish that Mr. Cisneros's accountant was aware of the full amount of the check at the time he prepared the tax returns. The full fee and the fact of the split deposit is referenced repeatedly in his work papers, and Mr. Gonzalez's files included a tax form 1099 from First Gibraltar reporting the \$80,000 as income. Mr. Gonzalez reports that he has no memory of anyone instructing him not to report the \$16,000.

Thus, based upon the evidence available to us, it appears that Mr. Cisneros's accountant was in possession of all the facts and that nothing was withheld from him with respect to this item of income. Nor is there any evidence that Mr. Cisneros gave any instructions or took any action that led to the failure to report the \$16,000; indeed, all of the witnesses interviewed testify clearly that Mr. Cisneros left the management of his finances to

³ According to the Independent Counsel, \$3000 of this \$16,000 cash was paid to Ms. Medlar.

others. There is nothing to suggest that the underreporting of income was anything more than, at worst, an accountant's error.

It is my conclusion that the mere fact of an error in a financial form prepared by an accountant on behalf of an individual, without any evidence to suggest the knowledge of or participation in the error by the individual, does not provide grounds to conduct a criminal investigation of that individual, particularly when the error is relatively minor. Since the Department of Justice possesses no evidence that attributes the failure to include the \$16,000 on Mr. Cisneros's tax return to Mr. Cisneros, even after giving the requisite great weight to the recommendation to the Independent Counsel, I find no grounds on which to investigate further whether Mr. Cisneros committed a tax violation in connection with this tax year.

I hereby notify this Court that no further investigation of tax year 1989 is warranted.

II. Tax Year 1991

Allegation and Facts Received. During tax year 1991, as in other years, Mr. Cisneros's primary source of income was payments for numerous speaking engagements. The affidavit attached to the Independent Counsel's request represents that Mr. Cisneros's accountant for the 1991 tax year and thereafter, Luis Hernandez, stated that he prepared Mr. Cisneros's 1991 tax return based on the Form 1099s received from organizations before which Mr. Cisneros had spoken. The affidavit represented that a comparison of known speaking engagements and fees against the

Form 1099s received from the payor organizations suggests that a number of organizations did not provide Form 1099s, and that "a discrepancy exists between the amount of income earned and the amount of income reported on Mr. Cisneros's 1991 tax return." As a result, the affidavit alleges, Mr. Cisneros underreported his income by approximately \$126,000.⁴ The Independent Counsel further alleged that the underreporting resulted from a scheme by Mr. Cisneros to conceal income from his accountant to make those funds available to pay Ms. Medlar.

The Results of the Preliminary Investigation. During the course of the preliminary investigation, the Department of Justice requested that the Office of Independent Counsel provide it with the figures, calculations and analysis to support the allegations in the affidavit. We were informed that the Office of Independent Counsel was relying on an interim assessment by the IRS agents reviewing Mr. Cisneros's tax liability, prepared in the spring of 1996, that stated that Mr. Cisneros's unreported income for tax year 1991 was \$126,000, but that provided no support for that calculation.

The Federal Bureau of Investigation (FBI) Special Agent who prepared the affidavit in support of the request for expansion did not provide any substantiation for the conclusion that income went unreported. The Special Agent informed the Department that his sworn affidavit was based entirely upon the interim findings

⁴ On February 27, 1997, the Independent Counsel informed us that he now believed the amount of unreported income was \$114,000.

of the IRS agents' administrative investigation. Attempts to verify limited information provided by the IRS agents to the Independent Counsel in support of this figure demonstrates that the figures provided are not reliable.⁵ Even giving great weight to the views of the Independent Counsel, I cannot recommend expansion of his jurisdiction to include purported tax violations when I have no facts to support a conclusion that income was not reported. I, therefore, at this point, possess no specific or credible evidence of the violation of a federal criminal law in Mr. Cisneros's submission of his 1991 tax return.

III. Tax Year 1992

Allegation and Information Received. During tax year 1992, the Independent Counsel alleges that Mr. Cisneros underreported his income by approximately \$158,000, in three different ways. First, the Independent Counsel alleges that the accountant's work papers suggest that the tax return does not include income received for speeches during the period from October 5, 1992, through December 31, 1992, in the amount of approximately \$75,000. Second, approximately \$53,000 in checks received from organizations before which Mr. Cisneros had spoken during 1992 was cashed without depositing the checks, and since the accountant relied on bank deposits to report income, that income allegedly was not reported. Finally, the tax return reflects a

⁵ We were provided a chart of approximately \$50,000 in allegedly unreported income, but review of the chart quickly demonstrated that most or all of this income was actually reported.

\$30,000 deduction for payments for an annuity, which the Independent Counsel alleges was not a deductible retirement fund.

The Results of the Preliminary Investigation. Mr. Cisneros's accountant, Mr. Hernandez, has been interviewed numerous times by the FBI and the IRS in the course of this matter, and Mr. Hernandez gave a sworn deposition to Mr. Cisneros's counsel. All of these previous interviews were reviewed in the course of the preliminary investigation, and Mr. Hernandez was interviewed again with respect to remaining questions. In addition, Mr. Hernandez's work papers, various financial records generated by Mr. Cisneros's bookkeeper to track income and expenses, and Mr. Cisneros's tax documents were reviewed. Additional witnesses were also interviewed in connection with our examination of tax year 1992.

Our preliminary investigation has developed little, if any evidence of a willful failure to report income on the part of Mr. Cisneros. Indeed, there is substantial evidence to suggest that Mr. Hernandez had available to him accurate information about Mr. Cisneros's income, and that responsibility for the failure to report income accurately rests with Mr. Hernandez. However, due to the abbreviated preliminary investigation period and statutory limitations on our access to IRS investigative materials, I have been unable to complete my exploration of the issue of Mr. Cisneros's intent. I therefore am unable, at this time, to conclude by clear and convincing evidence that Mr. Cisneros lacked the intent to commit tax crimes for tax year

1992, 28 U.S.C. § 592(a)(2)(B)(ii). I therefore am compelled to recommend that further investigation of tax year 1992 be placed into the hands of an Independent Counsel.

I recommend that David Barrett, Independent Counsel in the matter of former Secretary Cisneros's alleged false statements to the FBI during the course of his background investigation, be appointed to conduct this investigation through an expansion of his jurisdiction. Expansion of jurisdiction rather than appointment of a new Independent Counsel with respect to this matter is appropriate because Independent Counsel Barrett's current investigation involves the same individuals and time period. The Independent Counsel has expressed his willingness to accept this new matter if his jurisdiction is expanded.

IV. Tax Year 1993

The Allegations Received. The Independent Counsel's request alleges that early in 1993, Mr. Cisneros received approximately \$33,500 in distributions from two different Massachusetts Mutual Life Insurance Company Individual Retirement Accounts. The Independent Counsel alleges, and examination of Mr. Cisneros's 1993 tax return confirms, that this distribution was not reported as taxable income, as it appears should have been done.⁶

Results of the Preliminary Investigation. In the course of the review of the allegations concerning the 1993 tax year, in addition to the facts provided by the Independent Counsel, we

⁶ The Independent Counsel does not allege that any of this money was paid to Ms. Medlar.

interviewed several witnesses and examined the documentary evidence. The evidence suggests that Massachusetts Mutual mailed Form 1099s for the distributions in 1994, over a year after Mr. Cisneros had moved to the Washington, D.C., area to assume his responsibilities as Secretary of HUD. The forms were mailed to his former business and personal addresses, respectively, in San Antonio.

There is no evidence that Mr. Cisneros received the forms. Instead, it appears likely that the form mailed to his home was returned to the Post Office by Mr. Cisneros's sister-in-law, who was housesitting for the Cisneros family; she stated that it was her consistent practice to return all mail delivered to the home to the Post Office rather than forwarding it to Mr. Cisneros. We were unable to determine whether the Post Office still had a forwarding order in place for Mr. Cisneros at the time this form was mailed. Thus we are unable to determine what became of the 1099; there is, however, no evidence that Mr. Cisneros ever received it or took any steps to keep it from his accountant.

The other Form 1099 was addressed to a company with which Mr. Cisneros had formerly been associated. Representatives of that company stated that during the time in question, it was their practice to "bundle" mail that came addressed to Mr. Cisneros, and periodically forward it to his confidential assistant at HUD. She, in turn, stated that it was her practice to forward all tax-related documents directly to the accountant. There is no evidence, however, that the accountant ever received

this particular 1099. Thus, again, we are unable to determine what became of the second 1099, but also again, there is no evidence that Mr. Cisneros ever received it or took any steps to keep it from his accountant. Indeed, it appears that he established a system designed to ensure to the extent possible that all tax documents were promptly forwarded to the accountant.

Additionally, in view of the significant amount of other annuity and IRA income that was reported on Mr. Cisneros's 1993 tax return, I find no grounds to conclude that even had Mr. Cisneros perused each entry on his tax return, he likely would have recognized that the entries for annuity and IRA distribution income were too low and that something therefore must be missing. This conclusion is bolstered by the consistent testimony of all witnesses in this matter that Mr. Cisneros had entrusted his financial affairs to his bookkeepers and accountant, and did no independent monitoring of his finances on an ongoing basis. It is also bolstered by Mr. Hernandez's statement that he did not review the 1993 return carefully with Mr. Cisneros or discuss in detail the calculations he used to arrive at the figures on the return.

To summarize, at this time, I possess no evidence linking Mr. Cisneros to the failure to report the two distributions, and no evidence to suggest that he likely would have independently recognized the error without detailed review of the underlying paperwork on which his accountant had relied. Even giving the required great weight to the views of the Independent Counsel, in

the absence of any evidence suggesting that Mr. Cisneros bore any responsibility for the failure to report these distributions, I hereby notify this Court that no further investigation of tax year 1993 as a criminal matter is warranted.

OPPOSITION TO THE REQUEST FOR REFERRAL OF RELATED MATTERS

By Order of January 30, 1997, the Special Division of the Court for the Appointment of Independent Counsels requested the views of the Department of Justice with respect to an Application filed with the Court by the Independent Counsel. The Independent Counsel has requested that the Special Division grant him jurisdiction to investigate and prosecute Mr. Cisneros for alleged tax violations arising from tax years 1989 and 1991-1993, involving unreported income that was not paid to Linda Medlar. He requests this referral on the grounds that these tax allegations are "related to" his investigation of possible false statements by Mr. Cisneros to the FBI concerning the amount and frequency of his payments to Ms. Medlar. 28 U.S.C. § 594(e).⁷

⁷ Section 594(e) of the Independent Counsel Act provides:

Referral of other matters to an independent counsel.-- An independent counsel may ask the Attorney General or the division of the court to refer to the independent counsel matters related to the independent counsel's prosecutorial jurisdiction, and the Attorney General or the division of the court, as the case may be, may refer such matters. If the Attorney General refers a matter to an independent counsel on the Attorney General's own initiative, the independent counsel may accept such referral if the matter relates to the independent counsel's prosecutorial jurisdiction. If the Attorney General refers any matter to the independent counsel pursuant to the independent counsel's request, or if the independent counsel accepts a referral made by the Attorney General on the

I have considered the facts underlying the referral request, as part of my examination of the Independent Counsel's request for expansion of his jurisdiction as set out above, and herein have notified this Court of my conclusion that further investigation is not warranted. This Court therefore lacks jurisdiction to refer these matters to the Independent Counsel. 28 U.S.C. § 592(b)(1), In re Olson, 818 F.2d 34 (D.C. Cir. 1987); see discussion, *infra*.

Even were this matter being considered by this Court outside the context of my conclusions reached herein, the Court would lack jurisdiction to refer these tax matters to the Independent Counsel. The question of whether there existed grounds to investigate whether Mr. Cisneros committed tax violations that related to his alleged false statements to the FBI was considered in the course of the original preliminary investigation of this matter in 1995. At the time, there was no evidence to suggest that Mr. Cisneros had committed criminal tax violations in connection with this matter.⁸

Attorney General's own initiative, the independent counsel shall so notify the division of the court.

The Independent Counsel did not consult with the Department of Justice or request referral of this matter from the Attorney General.

⁸ Developing the full facts which might support a conclusion that a criminal tax investigation is warranted is a task that is normally entrusted to the IRS. At the time, the Department was aware that the IRS was inquiring into Mr. Cisneros' tax situation. If that inquiry developed sufficient evidence of potential criminal tax violations, the IRS would refer it to the Department, at which time, given that Mr. Cisneros was a covered person, it would be handled as an Independent Counsel matter, and

Accordingly, I specifically notified this Court that "no further investigation of this matter is warranted as a criminal tax matter." As a result, by operation of statute, "the division of the court shall have no power to appoint an independent counsel with respect to the matters involved." 28 U.S.C. § 592(b)(1).

As this Court made clear in In re Olson, 818 F.2d 34 (D.C. Cir. 1987), this express statutory limitation cannot be avoided simply by treating the matter as "related" and therefore subject to referral by the Court pursuant to section 594(e):

To suggest that the division of the court can bring about this result acting alone, upon the sole request of the independent counsel, would undercut the plain intent of § 592(b)(1) and permit the accomplishment by indirect means of a result that the statute prohibits being accomplished by direct means. Section 594(e) cannot be read to achieve such an unreasonable result.

Id., at 47.

However, the Independent Counsel seeks to evade this absolute bar by arguing that when the Notification concluded that "no further investigation of this matter is warranted as a criminal tax matter," and that there was insufficient evidence to support a conclusion that any tax laws had been violated "in connection with" Mr. Cisneros's payments to Ms. Medlar, I was only referring to what the Independent Counsel has described as

likely referred to the Independent Counsel as an expansion of jurisdiction. Although it appears that the Independent Counsel was aware of the pending IRS matter, he has chosen not to wait for its completion, nor did he consult with the Department concerning its practices in such a situation. Cf., 28 U.S.C. § 594(f).

the Medlar-Payment Income; i.e., whether Mr. Cisneros had committed any federal tax violations involving the specific funds he had paid to Ms. Medlar. The Independent Counsel concedes that this Court cannot refer the Medlar-Payment Income tax allegations as related matters.

This argument demands that this Court ignore the plain meaning of the words used in my Notification. It also would defeat the very conclusion the Court must reach before it can refer these matters. In order to support referral of an investigation concerning the Non-Medlar Payment Income tax allegations pursuant to section 594(e), that tax investigation must be "related to" the current jurisdiction of the Independent Counsel -- i.e., alleged false statements concerning Mr. Cisneros's payments to Ms. Medlar. However, the reference in the Notification to "this matter" clearly meant the allegations that Mr. Cisneros made false statements concerning his payments to Ms. Medlar.⁹ Therefore, any tax violations that "relate to" the alleged false statements by Mr. Cisneros within the meaning of section 594(e) by definition involve "this matter" and are "in connection with" his payments to Ms. Medlar or false statements concerning those payments. They are thus encompassed by my Notification.

The Independent Counsel cannot argue that the Non-Medlar Payment Income "relates to" Mr. Cisneros's alleged false

⁹ I stated, "I conclude that no further investigation of this matter is warranted as a criminal tax matter." Attorney General's Application at 4.

statements concerning his payments to Ms. Medlar for purposes of section 594(e) but do not "relate to" Mr. Cisneros's false statements concerning his payments to Ms. Medlar for purposes of my prior Notification. Therefore, referral of the Non-Medlar Payment Income tax allegations as related matters by this Court has been specifically foreclosed by the 1995 Notification.

REFERRAL AS A RELATED MATTER BY THE COURT IS NOT WARRANTED

Even apart from this jurisdictional bar, referral by this Court of Non-Medlar Payment Income tax allegations to the Independent Counsel as a related matter would not be appropriate.¹⁰ Any attempt by the Court to separate Medlar-Payment Income from Non-Medlar Payment income and to conclude that the latter is "related" to the Independent Counsel's jurisdiction is impossible, given the factual context in which these allegations arise.

First of all, as indicated above, it is not practical to investigate part of a tax year. Because a criminal tax investigation is based on an audit and analysis of an entire tax year, the Independent Counsel's request that this Court carve out a piece of the tax picture for any given year and refer it to him

¹⁰ In addition, the Department of Justice has not abandoned and hereby reasserts for the record its view that under the careful balance of constitutional roles struck under the Independent Counsel Act, this Court lacks the authority to unilaterally refer a matter to an independent counsel without the concurrence of the Attorney General. However, recognizing that this Court found to the contrary in In re Espy, 80 F.3d 501 (D.C.Cir., Spec. Div. 1996), the Department will not repeat herein its statutory and constitutional arguments with respect to that point.

is unworkable. The proposal that this Court divide up Mr. Cisneros's income for four separate tax years and refer parts of it to him for tax prosecution would create a tax non sequitur.

Even were his request a hypothetical possibility, the Independent Counsel concedes that he cannot now distinguish the Medlar-Payment Income from the Non-Medlar Payment Income with any clarity. Sealed Application at 7. This alone suggests that even if my prior Notification could be read as making such a peculiar and unprecedented distinction, it should not be.¹¹ The Court would be in the position of having no idea what was being referred to the Independent Counsel and the Independent Counsel would have no idea what he was authorized to investigate.

In addition, analyzed in isolation and separate from the Medlar-Payment Income allegations, the matters as to which the Independent Counsel seeks referral cannot be concluded to be "demonstrably related to the factual circumstances," Espy, supra at 507, that underlie the Independent Counsel's current jurisdiction. The allegedly false income tax forms for two of the four years referenced by the Independent Counsel were not filed until after Mr. Cisneros's alleged false statements were made to the FBI. It is difficult to argue that his false statements to the FBI about his payments to Ms. Medlar in late

¹¹ The Independent Counsel's argument would require that the Court engage in a hypertechnical semantical analysis of what I had in mind when I provided this Court with my Notification concerning tax violation, a clearly inappropriate exercise that can only lead to awkward and unworkable results. The Court should decline the Independent Counsel's invitation.

1992 were intended in any way to hide or disguise future tax violations unrelated to his payments to her.

Approaching the argument from the other perspective, the Independent Counsel seeks to argue that the later allegations concerning taxes relate to the false statements concerning the payments to Ms. Medlar because "underreporting his income helped hide the existence and amount of funds that were used in part to pay Medlar." Application at 14. This argument defies logic; it would be full disclosure of his income that would tend to defuse any possible concerns over his payments to Ms. Medlar, because that would suggest that he had ample income to make the payments; underreporting would suggest just the opposite. There is no logical link between a lower income and lower payments to Ms. Medlar that would support an argument that falsely claiming a low income would in any way tend to hide false assertions that the payments were less than they in fact were. In any event the Independent Counsel offers no explanation of how tax evasion in documents filed with the IRS in 1993 and 1994 tends to hide false statements made to the FBI in 1992 concerning unrelated payments.

To summarize, this Court lacks the authority to refer the matters requested by the Independent Counsel to him as related matters pursuant to section 594(e). It is barred from doing so both by my findings herein that further investigation is not warranted, and by my parallel findings in my 1995 Notification to

the Court. In addition, the referral requested by the Independent Counsel is impossible, because income tax violations related to payments to Ms. Medlar cannot be separated from potential income tax violations related to income that was not used to make payments to Ms. Medlar.

Recommended Jurisdiction. Pursuant to 28 U.S.C. § 593(c)(1), I recommend and request that the Special Division of the Court expand the Independent Counsel's jurisdiction to permit investigation of tax year 1992 and determine whether prosecution of tax violations arising from the income tax returns filed in that tax year is warranted. In this connection, I have appended hereto a recommended statement of expansion of prosecutorial jurisdiction for the Independent Counsel.

Disclosure. I request that the Court authorize disclosure of this filing only to Independent Counsel Barrett and his staff, pursuant to 28 U.S.C. § 592(e), and to Mr. Cisneros and his counsel. Although the Independent Counsel's current investigation is a well publicized matter, these new allegations are not. I have no reason to conclude that the public interest will be served by disclosure.

Respectfully submitted,



Janet Reno
Attorney General of the United States

DATED: FEB. 28, 1997

Expanded Statement of Jurisdiction

The Independent Counsel shall continue to enjoy the full jurisdiction initially conferred upon him as a result of the May 24, 1995, order of the Special Division of the Court. Pursuant to 28 U.S.C. § 593(c)(1), the Independent Counsel's jurisdiction shall be expanded to include the following:

The Independent Counsel shall have jurisdiction and authority to investigate to the maximum extent authorized by the Independent Counsel Reauthorization Act of 1994 whether Henry G. Cisneros, former Secretary of the United States Department of Housing and Urban Development, has committed a violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by underreporting income on his personal income tax return for tax year 1992 or conspiring with others to do so.

The Independent Counsel shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law, other than a Class B or C misdemeanor or infraction, by any individual or entity as necessary to resolve the matter described above.

The Independent Counsel shall have jurisdiction and authority to investigate any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal criminal law, in connection with any investigation of the matters described above.

The Independent Counsel shall have jurisdiction and authority to seek indictments and to prosecute any persons or entities involved in any of the matters described above, who are reasonably believed to have committed a violation of any federal criminal law arising out of such matters, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

The Independent Counsel shall have all the powers and authority provide by the Independent Counsel Reauthorization Act of 1994.

[REDACTED]
MFKlotz/MENeedle

MAR 27 1997

District Director, South Texas District
Attn: Chief, Criminal Investigation Division

Assistant Chief Counsel (Criminal Tax) [REDACTED]

Henry G. Cisneros
Washington, D.C. [REDACTED]

DECLINATION MEMORANDUM

The purpose of this memorandum is to advise you that for the reasons detailed below, it has been determined that the proposed case involving Henry G. Cisneros does not meet the Service standards for prosecution (guilt beyond reasonable doubt and reasonable probability of conviction), and as a consequence is hereby declined. Be advised that unless we receive formal notice within ten days that the Assistant Commissioner (Criminal Investigation) has decided to protest this determination, the case will be closed and released for civil consideration.

Background

The subject case was forwarded to us by your memorandum dated December 20, 1996, recommending that Cisneros be prosecuted for violations of 26 U.S.C. § 7206(1) for the taxable years 1991, 1992 and 1993. On January 30 and 31, 1997, we met with Special Agents Kesha Lange and Dorman Barrows and Group Manager Sheila Colberson concerning questions we had about the case. On February 12, 1997, a conference was held with Cisneros' representatives. Pursuant to our memorandum dated March 7, 1997, the case was placed in supplemental status to accommodate your request for a conference concerning our preliminary determination in this matter. This conference was held on March 18, 1997, at which time the case was returned to active status.

This case originated as a result of information given to the Federal Bureau of Investigation during its background investigation to finalize Cisneros' confirmation as Secretary of HUD. The information pertained to the amounts and frequency of payments allegedly made by Cisneros to Linda Medlar.

¹ Since receipt of this case, we have been informed that Cisneros has relocated to Los Angeles, California.

GJ 00-001 Ex. 93

EXHIBIT

#93

Cisneros was born on June 11, 1947, is married and has three children ages [REDACTED]. Cisneros received his undergraduate degree from Texas A&M, a masters degree in urban and renewal planning from Texas A&M, a masters degree in public administration from Harvard and a doctorate degree from George Washington University. As a full time professor at the University of Texas at San Antonio and a part time professor at Trinity University, Cisneros taught public administration and urban affairs. Cisneros was a four term mayor of San Antonio from April of 1981 until June of 1989. After serving as mayor of San Antonio, he established five businesses and from June 1989 until January 1993, served on boards of directors for as many as 35 companies. Of the businesses Cisneros created, Cisneros Communications began operation in June 1989 as a Schedule C sole proprietorship. The primary source of income of this business resulted from Cisneros' speechmaking as arranged by his agent, Royce Carlton, Inc., as well as other income from radio programs, director's fees and events not arranged by his agent. Speaking engagements were also arranged by the office personnel at Cisneros Communications. During the subject years, Cisneros' businesses utilized numerous bank accounts which were, in essence, maintained by two of his employees, Sylvia Arce-Garcia and Alfred Ramirez.²

SAR Recommendation

The Special Agent's Report (SAR) which utilizes the bank deposits and specific items methods of proof, concludes that Cisneros violated § 7206(1) because he failed to report all income from Cisneros Communications on his returns for 1991, 1992 and 1993, deducted contributions to a non-qualified annuity as SEP contributions in 1992 and failed to report distributions from an IRA as income in 1993. The statute of limitations will bar prosecution of the earliest alleged offense after August 24, 1998.

Discussion

The elements which the government must prove beyond a reasonable doubt to establish that Cisneros violated § 7206(1) are that: (1) he subscribed each return that was false as to a material matter; (2) each return contained a written declaration that it was made under the penalties of perjury; (3) he did not believe each return to be true and correct as to every material matter; and, (4) he falsely subscribed each return willfully with the specific intent to violate the law. Sansone v. United States, 380 U.S. 343 (1965), Spies v. United States, 317 U.S. 492 (1943).

² John Rosales assumed the duties of Alfred Ramirez when the latter left Cisneros Communications in September 1992.

While it appears that the first two elements can be proven, our major concern with this case turns on willfulness.³ Generally, willfulness is defined as a voluntary intentional violation of a known legal duty. United States v. Pomponio, 429 U.S. 10 (1976), United States v. Bishop, 412 U.S. 346 (1973). For criminal tax purposes, the government is required to prove that the law imposed a duty on a defendant, the defendant knew of the duty and the defendant voluntarily and intentionally violated that duty. Cheek v. United States, 489 U.S. 192 (1991). Courts have recognized that a good faith reliance on others regarding one's tax liability, creates an absence of willfulness necessary to sustain a conviction. In this case, Cisneros seems to have relied significantly on others as he was travelling regularly and was rarely home as a result of his efforts to make money to cover obligations that he was behind on such matters as the payment of bills in general and specifically, Forms 941 payments and payments to Medlar. As Cisneros was out looking for additional work to meet his cash flow demand, he entrusted his office management to a number of employees without realizing they were not fulfilling his obligation to prepare and file complete and accurate returns.

Although the recommended case includes proposed specific items in 1992 and 1993, the main thrust concerns the understatement of gross receipts from Cisneros' speaking engagements as determined by the bank deposits analysis. The SAR's theory is that despite statements to the contrary, Cisneros did not deposit all income into business accounts and " . . . knowingly and willfully bypassed every accounting system which had been specifically set up to insure (sic) all income was deposited, recorded and reported." (SAR p. 50). The evidence does not support the allegation.

According to the SAR of the \$107,052.66 understatement of gross receipts computed for 1991, Cisneros failed to deposit \$50,335.33. And of the \$111,290.78 understatement of gross receipts computed for 1992, Cisneros failed to deposit \$53,190.00. (Parenthetically, 1993 utilizes a specific item method of proof and determines that Cisneros understated gross receipts by \$3,022.⁴) It is the 1991 and 1992 non-deposited

³ Although we disagree with some of the agent's computations and portrayal of understatements, this memorandum focusses primarily on the willfulness issue.

⁴ In computing the \$3,022 understatement, the SAR determines that the correct gross receipts are \$7,532 and the reported receipts are \$4,510. The SAR is wrong for both. As discussed herein, the corrected gross receipts are \$1,745 and the reported receipts are \$4,500.

receipts that purportedly support the element of willfulness - for failure to report income by itself is insufficient to sustain a finding of fraud. The failure to deposit those amounts had they not been captured in the accounting system or reported would support a prima facie case. But, as detailed below, that is not what occurred. To the contrary, as portrayed in Attachment A herein for 1991 all non-deposited gross receipts were captured in the accounting system and most were actually reported on the return. Similarly, as portrayed in Attachment B herein, for 1992 most of the non-deposited gross receipts were again captured in the accounting system and actually reported. Additionally, a receipt from Harvard University for \$1,000 was erroneously included in the SAR recommendation for 1992, although it was paid to Cisneros in 1991, a 1991 Form 1099 was issued to him and all indications are that he reported it in 1991. Similarly, receipts from Time (\$2,500), Royce Carlton (\$1,080), Indiana Electric (\$1,528), and University of Houston (\$679) were erroneously included in the SAR recommendation for 1993 resulting in a determination that Cisneros' underreported his gross receipts by \$3,012, although each of those receipts were paid in 1992, included in 1992 Forms 1099 and all indications are that he reported them in 1992.

The difficulties with willfulness do not end here. The manner in which the returns were prepared also detract from willfulness. Cisneros' returns for the subject years were prepared by Luis Hernandez who replaced Rene Gonzalez who, free of charge, had provided accounting services for Cisneros and prepared his returns for the years 1976 through 1990. Gonzalez was "free help," who could not provide the level of day by day involvement that Cisneros' expected in his burgeoning business. [REDACTED] When Cisneros hired Hernandez in early 1992 to take over the accounting and prepare all returns starting with the 1991 return, he had no reason to believe that Hernandez would provide anything by competent service. After all, "Hernandez is a C.P.A. with advanced degrees in accounting. " Cisneros certainly had no way to know that Hernandez had been a numbered informant for the Internal Revenue Service and, in fact, at one time alleged that Cisneros had conspired with another to defraud the city of San Antonio. It is noteworthy that at least one special agent was surprised to hear that Hernandez was working for Cisneros since he believed that Hernandez harbored a great dislike toward Cisneros. And, while this fact does not rise to the level of facts present in United States v. Nolas, No. 89-49 CR(4) (E.D. Mo.), under the Attorney General's Giglio policy, the fact that the Service is in the

unique position to know that Hernandez had a grudge against Cisneros will have to be turned over to the defense. See United States v. Giglio, 405 U.S. 105 (1972).

When Hernandez undertook to prepare Cisneros' 1991 return, he was provided with a profit and loss statement created from a Quicken computerized accounting system and Forms 1099 issued for that year to Cisneros. [REDACTED]

[REDACTED] 1997). Although Hernandez was told by Ramirez and others that all income was supposed to be deposited, he concluded that transfers from Cisneros' accounts might have been improperly included in income. [REDACTED]

[REDACTED]. Since Arce-Garcia told Hernandez that Cisneros received no income from sources other than cities, universities, and Royce Carlton, Inc. [REDACTED], Hernandez decided to use the sum of the 1991 Forms 1099 plus various other amounts from the Quicken profit and loss statement for the 1991 tax return. [REDACTED].

As noted above, SAR Appendix B-4 lists the specific income items that were not deposited in each of the subject years. For 1991, this list consists of seventeen checks totaling \$50,335.33 from ten different payors. These non-deposited specific income items were added to the total Cisneros Communication deposits to arrive at Mr. Cisneros' understatement of taxable income. Of the seventeen specific income items that were not deposited, thirteen (totalling \$34,335.33) were reported on 1991 Forms 1099 - thus, each of these was reported on the return. The four that were not reported on Forms 1099 and purportedly not reported on the return were received from three different payors United Way (\$4,500), Harris Methodist Hospital (\$2,000 and \$2,000) and American German Conference (\$7,500). These four non-deposited items, however, were included in Arce-Garcia's green ledger and did not bypass the accounting system as alleged in the SAR. See Attachment A.

In 1992, Hernandez was much more involved with the day-to-day record keeping, and was familiar with the input of data from bank statements, checks and deposit slips into a Quickbooks system, a commercial bookkeeping package compatible with Quicken [REDACTED]. In preparing the 1992 return, Hernandez compared the total bank deposits to the total 1992 Forms 1099 received and Arce-Garcia's records. [REDACTED]. Hernandez decided to again report gross receipts as determined from Forms 1099 for sources of the deposited funds were not identified by Cisneros' office [REDACTED].

The 1992 non-deposited receipts in SAR Appendix B-4 in the amount of \$53,190.00 are made up of twenty-eight checks from twenty-one different payors, as portrayed in Attachment B. Similar to 1991, of the twenty-eight specific income items that were not deposited, fourteen totalling \$35,932 were reported on 1992 Forms 1099, and reported on the return. The fourteen that were not reported on Forms 1099, were received from twelve different payors. Of these fourteen non-deposited items, seven were included in Arce-Garcia's green ledger. The remaining seven that are neither reported on Forms 1099 nor included in the green ledger total \$7,508.08 - the amount that can be said to have bypassed the accounting system, the tax on which is not particularly significant. In addition, as noted above, the \$1,000 paid by Harvard University as set forth in Appendix B-4 for 1992, in fact, appears on a check dated December 31, 1991, and a 1991 Form 1099, and presumably reported on Cisneros' 1991 return along with the other 1099 receipts for that year. [REDACTED]

The SAR also includes as a criminal item for 1992 the disallowance of a deduction for payments Cisneros made to his annuity with Lincoln Benefit Life Company which was not a qualified retirement plan. However, in an affidavit dated February 4, 1997, Hernandez takes full responsibility for this error, thus eliminating any willfulness on Cisneros' part. [REDACTED]

In addition to taking an improper deduction on Cisneros' 1992 return, Hernandez made other mistakes that are amateurish and totally inexcusable - thereby raising significant questions as to whether he was either incompetent or intentionally setting up Cisneros in furtherance of his previous grudge. More specifically, Hernandez erroneously claimed as 1992 Schedule A itemized deduction payments Cisneros made that year for federal income taxes. [REDACTED]

Hernandez also prepared Cisneros' 1993 return from Forms 1099, Forms 1099R, annuity closing statements, discussions with brokers concerning stock sales and other information provided by Cisneros. [REDACTED] The Forms 1099 were used to determine Schedule C income which Cisneros received from speaking engagements and from director's fees.

As noted above, the SAR determined that in 1993 Cisneros received \$7,532.00 in speaking fees from six different payors, and that since he only reported \$4,500.00, concluded he understated his gross receipts by \$3,032.00 (See, fn. 4, supra). The SAR is in error. Of the six specific income items four were paid to Cisneros by checks dated in 1992, reported on 1992 Forms 1099, and presumably reported on the 1992 return along with the other 1099 receipts for that year.

So while the two that were not reported on Forms 1099 (University of Wisconsin - \$1,465, and Texas A&M - \$280), all the SAR definitively proves is that Cisneros may have overstated his gross receipts for that year. See Attachment C.

The SAR also concludes that although Cisneros' 1993 return reports annuity distributions, it failed to report distributions he received from his Massachusetts Mutual IRA account. [REDACTED]. The difficulty with including these as criminal items is that one Form 1099 for these distributions was mailed to Cisneros' San Antonio address where he no longer resided and one was mailed to the unoccupied Cisneros Communication address. In addition, due to a Massachusetts Mutual error, the amount of the distributions on one of the Forms 1099 contained an understatement of \$2,836.23. This error was acknowledged by Massachusetts Mutual in a letter dated October 30, 1996. [REDACTED]. Also of note is the fact that Hernandez prepared Cisneros' Public Financial disclosure Reports for 1992 and 1993 and, therefore, he should have known that since the Massachusetts Mutual account was no longer included on the 1993 Report, there must have been a distribution.

In short, although the SAR, on its face, establishes that not all of Cisneros' income was deposited in the years involved, the non-depositing of income does not support the conclusion that the items either bypassed the accounting systems or were not reported. In sum, the non-depositing of income was not relevant to how the returns were prepared, and as such are of minimal value in proving willfulness. The fact of the matter is that the evidence shows there were ample records which reflected Cisneros' income for the subject years including bank deposits, Forms 1099 and Arce-Garcia's ledgers. Hernandez chose the Forms 1099 as opposed to deposits, as Gonzalez had done in prior years, and prepared the returns on this basis. There is no evidence that Cisneros hid the non-depositing from his staff. In fact, as shown on Attachments A and B, Arce-Garcia captured \$12,350.00 of these items in the green ledger and frequently noted that they represented payments made by particular institutions directly to Cisneros. There is no evidence that Cisneros directed anyone not to report income. In fact, a substantial amount of it (\$67,267.33) was reported. See Attachments A and B. Furthermore, an argument can be made that if all of the institutions which paid Cisneros income during the years in question had issued Forms 1099 as required by law, all of his income would have been reported regardless of the fact that all income was not deposited. The evidence further shows that Cisneros was aware that the income portions of his returns were prepared based on Forms 1099 and, thus, it cannot be proven that he knew that his returns were false in that regard.

In sum, all of Cisneros' income for 1991 was either deposited, accounted for on Forms 1099 or in Arce-Garcia's green ledger. Consequently, there was no concealment because all of the income appeared in one or more record keeping systems. In 1992, all income, with the exception of \$7,508.08, was either deposited, accounted for on Forms 1099 or in Arce-Garcia's green ledger. Again, but for \$7,508.08 there was no concealment. In addition, Hernandez made glaring errors on the 1992 return, including the deducting of the SEP contributions included in the SAR as a criminal adjustment, and the deducting of federal income tax payments as itemized deductions. In 1993, although all income is not deposited, several of the non-deposited items are incorrectly attributed to 1993, and when compared to the \$4,500 reported on Cisneros' Schedule C, there, may in fact, have been a Schedule C overstatement. In regard to the Massachusetts Mutual item, the evidence surrounding Hernandez' knowledge of this item as well as the incorrect mailing of the Forms 1099 and the error on one Form 1099, renders this item questionable for criminal purposes.

In addition to the matters previously mentioned, what is most noteworthy about this case is that rather than be awash with substantial funds inconsistent with his reported income as the SAR would suggest he should have been, Cisneros' financial well being greatly suffered in the years at issue. His bank accounts dwindled and he had to resort to cashing in annuities previously set up to supplement his public service pensions.

Tape Recordings

In analyzing the evidence the SAR greatly emphasizes the contents of tape recordings Cisneros' girlfriend, Linda Medlar, surreptitiously made of Cisneros. Use of these tapes are problematical at best, and their evidentiary value is not what the SAR suggests. To admit them in evidence, since they were not recorded under law enforcement supervision, only Medlar will be able to authenticate them. It is noted that her cooperation with the government has been sporadic, periodically requiring that she be immunized. There is confusion as to the whereabouts of the original tapes. And, pursuant to 18 U.S.C. § 2511(d) the admissibility must be determined by state law. In that regard, we cannot overlook the many travels of Cisneros into jurisdictions some of which (e.g Massachusetts) require as a condition precedent to admissibility that both parties consent to the recording - something that did not occur herein. See Mass. Annotated Laws, Chap. 272, § 99 D. (1&2).

Moreover, the results from our review of the tapes is different from the investigating agent. Rather than conclude they contain evidence of Cisneros' intent to understate his

taxes, we are impressed by his statements that he believed he was paying his taxes.⁵ [REDACTED] Proof that he believed otherwise is lacking.

Character Evidence

Furthermore, when considering the merits of this case, the fact that Cisneros is a popular figure with many years of high level public service, cannot be overlooked. He will be able to parade numerous dignitaries before the court to establish his high moral character potentially raising questions about his willfulness even without any of the foregoing difficulties.

Disclosure Violations

Finally, we are concerned with the apparent disclosure violations that occurred during the course of this investigation. Numerous items were regularly provided to the Independent Council beyond the express terms of disclosure orders. Even after admonitions from this office dialogue continued. Even though the most recent (i) Order would now allow turnover, it did not accurately reveal to the court that the disclosure of the sought after documents had already taken place, albeit improperly. These occurrences are both disappointing and will most likely burden any prosecution with damaging distractions. Although disclosure violations should not lead to dismissal of charges or suppression of evidence, under the aforementioned Giglio policy, violations by testifying witnesses must be revealed. In this regard we note that despite prior statements that only the Disclosure Officer turned items over to the Independent Council many of the transmissions are signed by the case agent.

Conclusion

As a result, considering all the evidence as well as all of the facts and circumstances surrounding this case, we cannot say that the evidence indicates guilt beyond a reasonable doubt and that there is a reasonable probability of conviction.

⁵ We are cognizant of the tape wherein Cisneros is heard to respond to whether Hernandez knew of the payments to Medlar that " . . . he doesn't get involved with that, he accounts with the accounts for the money that we put into the system and the money I help you with comes before that, comes out before it gets to him." [REDACTED] When considering this statement in the context of the question and all the other evidence, we believe its significance simply goes to the fact that there were payments to Medlar and not that the money would not be reported for tax purposes.

Notwithstanding the foregoing, we considered the possibility of forwarding this matter to the Tax Division with a prosecution recommendation predicated upon taking Hernandez, Arce-Garcia and Alfred Ramirez before the grand jury to ascertain whether their testimony would be different in that atmosphere as compared to the setting of their prior testimony before the special agents and one of Cisneros' attorney. We concluded there is no reason to believe that the witnesses will change their testimony to the extent that it will establish that Cisneros directed them to not record income or to conceal income from Hernandez. In fact, all evidence of income was available to Hernandez to the same extent it was available to Gonzalez in prior years. By way of restatement, virtually all of the unreported income was either in Arce-Garcia's green ledger or on Forms 1099 or in the Quicken program. Why all income was not reported remains an unanswered question which rests heavily on Hernandez - a person with history as an informant who had a grudge against Cisneros. Regardless, the fact is that some income not on the returns is unexplainable but, unfortunately, lack of explanation does not equate to guilt beyond a reasonable doubt.

To summarize, we have concluded that the recommended offenses cannot be proven beyond a reasonable doubt and that there is no reasonable probability of conviction. Accordingly, we decline to refer this case to the Tax Division, Department of Justice, for criminal prosecution and instead, recommend that the criminal aspects of this case be closed.

Unless we receive notification within ten working days from the date of this memorandum that the Assistant Commissioner (Criminal Investigation) intends to protest this matter, we will proceed to close our files and release this case for civil disposition.

BARRY J. FINKELSTEIN

BARRY J. FINKELSTEIN

Attachments
As stated

MFKlotz/BJFinkelstein/pt 3/27/97
CISNEROS.BJF

Specific Income Items Not Deposited

1993

SOURCE	AMOUNT	FORM 1099 RECEIVED
Time Inc. *	\$2,500.00	\$2,500.00
Royce Carlton *	1,080.00	1,080.00
Indiana Electric *	1,528.00	1,528.00
University of WI	1,465.00	
University of Houston*	679.00	679.00
TX A & M	280.00	
TOTALS	7,532.00	5,787.00

* (\$5,787.00) Total amount of specific income items that were dated in 1992 and reported on a 1992 Form 1099.

Attachment C

PC:EL:LT	CC:SI					
MN	Joe					
1-1-1-1	1-1-1-1					

Specific Income Items Not Deposited

1991

SOURCE	AMOUNT	FORM 1099 RECEIVED	ENTERED IN GREEN LEDGER
Royce Carlton	\$5,600.00	\$5,600.00	
Royce Carlton	4,000.00	4,000.00	
National Assn Ind Ins	3,000.00	3,000.00	\$3,000.00
Southwestern University	1,500.00	1,500.00	\$1,500.00
Southwestern University	425.00	425.00	425.00
Royce Carlton	9,425.00	9,425.00	
Royce Carlton	3,250.00	3,250.00	
University of California	1,395.00	1,395.00	
Royce Carlton	122.21	122.21	
Amer Lead Forum/Gulf Chp	500.00	500.00	500.00
United Way Houma La	4,500.00		4,500.00
Harris Methodist Hospital	2,000.00		2,000.00
Harris Methodist Hospital	2,000.00		2,000.00
American German Conf.	7,500.00		7,500.00
Federal Reserve	1,414.88	1,414.88	
Rockfeller	3,503.24	3,503.24	
Federal Reserve	200.00	200.00	
TOTAL	50,335.33	34,335.33	21,425.00

Attachment A

CC:EL:U	CC:U					
MA						

Specific Income Items Not Deposited

1992

SOURCE	AMOUNT	FORM 1099 RECEIVED	ENTERED IN GREEN LEDGER
Harvard University **	\$1,000.00	\$1,000.00	
Federal Reserve *	408.00		
CRSS	1,500.00	1,500.00	-
Round Rock Chamber Comm	2,500.00	2,500.00	\$2,500.00
Nat'l Assoc Dev Ed	3,000.00		3,000.00
Round Rock Chamber Comm	58.00	58.00	
Citizens Chamber Comm	2,000.00		2,000.00
Ethnic Coalition	1,500.00		1,500.00
Tarrant County JR College	2,000.00	2,000.00	2,000.00
Federal Reserve *	500.00		
S.B.Hispanic Achievement*	2,000.00		
Tax Conference on Aging *	500.00		
Int'l Reading Assn *	1,000.00		
Federal Reserve [REDACTED] *	100.00		
Am Assn Respiratory Care	2,500.00	2,500.00	2,500.00
Rio Grande Council *	3,000.00		
Royce Carlton [REDACTED]	675.00	675.00	675.00
So Tax Econ Conf/CPL	2,500.00		2,500.00
Royce Carlton	750.00	750.00	750.00
Northern Ind Elec Assn	3,750.00	3,750.00	3,750.00

000.00

Specific Income Items Not Deposited

1992

SOURCE	AMOUNT	FORM 1099 RECEIVED	ENTERED IN GREEN LEDGER
vard University **	\$1,000.00	\$1,000.00	
ral Reserve *	408.00		
	1,500.00	1,500.00	
Rock Chamber Comm	2,500.00	2,500.00	\$2,500.00
Assoc Dev Ed	3,000.00		3,000.00
Rock Chamber Comm	58.00	58.00	
ns Chamber Comm	2,000.00		2,000.00
Coalition	1,500.00		1,500.00
County JR College	2,000.00	2,000.00	2,000.00
reserve *	500.00		
anic Achievement*	2,000.00		
erence on Aging *	500.00		
ding Assn *	1,000.00		
serve [REDACTED] *	100.00		
spiratory Care	2,500.00	2,500.00	2,500.00
Council *	3,000.00		
on [REDACTED]	675.00	675.00	675.00
Conf/CPL	2,500.00		2,500.00
n	750.00	750.00	750.00
Elec Assn	3,750.00	3,750.00	3,750.00

①

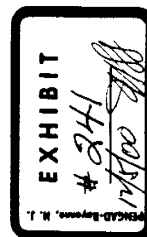
1991

SCHEDULE C NET INCOME FROM BUSINESS	FORM 1040 REPORTED TAXABLE INCOME	NON-DEDUCTIBLE PERSONAL EXPENDITURES	PURPOSE	EVIDENCE IN SAR
61,014.00	105,509.00			<ul style="list-style-type: none"> W1-1 1991 1040 Tax Return, Schedule C line 31 W1-1 1991 1040 Tax Return pg. 3 line 37 W24-8 Schedule of Payments (signed by Medlar) W3-15 1991 Analysis of deposits into joint (wife's) household account @ Westside Bank a/c# 125-107-3: (account predominantly funded via checks from Cisneros business account and Cisneros income checks deposited directly into account) SAR p. 40 par. 3c wife got \$6,000 to \$8,000 per month per Off. Mgr. Garcia (1/26/95 interview) W5-2 par. 16 SAR pgs. 15 par. 3, 22 par. 5, 26 par. 8, 54 par. m. Neither Rene Gonzalez, CPA (2/10/95 interview) W20-1 pg. 8 nor Luis Hernandez, CPA (4/4/96 interview) W21-3 pg. 6 were given access to the joint (wife's) acct., Westside Bank a/c # 125-107-3 W25-2 \$2,500 monthly debit from bus. acct. (face of each bank stmt.) & SAR p. 13 par. 11. p. 35 & pp. 36, 55 par. 3b Cisneros knew not deductible and tax and penalty for early withdrawal, Ins. Agent Ornelas (10/3/96, 10/29/96 interviews) W22-1, 2, 3, 4
61,014.00	105,509.00	73,024.21 82,858.00	Medlar wife/household	
		17,500.00	Lincoln Benefit annuity	
61,014.00	105,509.00	173,382.21		

Personal Expenditures 173,382.21
 LESS:
 Sched. C Net Income 61,014.00
 Difference 112,368.21

* Personal Expenditures 173,382.21
 * LESS:
 * 1040 Taxable Income 105,509.00
 * Difference 67,873.21

- Schedule C is 35% of what spent
- Spent 65% more than reported on Schedule C
- reported taxable income 61% of what spent
- spent 39% more than reported taxable income



1992 A
USING HERNANDEZ'S PROFIT AND LOSS FIGURES

SCHEDULE C NET INCOME FROM BUSINESS	REPORTED TAXABLE INCOME	NON-DEDUCTIBLE PERSONAL EXPENDITURES	PURPOSE	EVIDENCE IN SAR
109,195.00	68,599.00			<ul style="list-style-type: none"> W1-3 1992 1040 Tax Return, Schedule C line 31 W1-3 1992 1040 Tax Return pg. 3 line 37 W24-8 Schedule of Payments (signed by Medlar) W21-7 Profit & Loss pg. 2 and Income/Expense Summary (by Hernandez, computer printout of checks from Cisneros business bank accounts) " " " " " " " " — (\$30,000 wrongly deducted Form 1040 line 27) W21-7 P&L pg. 2. Income/Expense Summary pg. 24 (Hernandez's computer printout of checks from Cisneros business bank accounts) 3/20/97 6 pp. fax to ACC from S/A Lange.
109,195.00	68,599.00	278,746.65		

Personal Expenditures	278,746.65	* Personal Expenditures	278,746.65
LESS:		* LESS:	
Sched. C Net Income	109,195.00	* 1040 Taxable Income	68,599.00
Difference	169,551.65	* Difference	210,147.65

- Schedule C is 39% of what spent
- Spent 61% more than reported on Schedule C
- reported taxable income 25% of what spent
- spent 75% more than reported taxable income

1992B

SCHEDULE C NET INCOME FROM BUSINESS	FORM 1040 REPORTED TAXABLE INCOME	NON-DEDUCTIBLE PERSONAL EXPENDITURES	PURPOSE	EVIDENCE IN SAR
109,195.00	68,599.00			<ul style="list-style-type: none"> W1-3 1992 1040 Tax Return, Schedule C line 31 W1-3 1992 1040 Tax Return pg. 3 line 37 W24-8 Schedule of Payments (signed by Medlar) W25-2 \$2,500 monthly debit from bus. acct. (face of each bank stmt) & SAR p. 13 par. 11, pp. 36, 55 par. 3b Cisneros knew not deductible and tax and penalty for early withdrawal, Ins. Agent Ornelas (10/3/96, 10/29/96 interviews) W22-1, 2, 3, 4 W21-7 P&L pg. 2. Income/Expense Summary pg. 24 (Hernandez's computer printout of checks from Cisneros' business bank accounts) 3/20/97 6 pp. fax to ACC from S/A Lange. W3-15 1992 Analysis of deposits into joint (wife's) household account @ Westside Bank a/c# 125-107-3: (account predominantly funded via checks from Cisneros business accounts and Cisneros income checks deposited directly to this account) SAR p. 40 par. 3c wife got \$6,000 to \$8,000 per month per Off. Mgr. Garcia (1/26/95 interview) W5-2 par. 16) SAR pgs. 15 par. 3, 22 par. 5, 26 par. 8, 54 par. m. Neither Rene Gonzalez, CPA (2/10/95 interview) W20-1 pg. 8 nor Luis Hernandez, CPA (4/4/96 interview) W21-3 pg. 6 were given access to the joint (wife's) acct., Westside Bank a/c # 125-107-3 W21-7 Income/Expense Summary PG. 24 (Hernandez's computer printout of checks from Cisneros business bank accounts)
		67,580.00	Medlar	
		30,000.00	Lincoln Benefit	
		49,634.83	Personal Taxes	
		74,625.00	Wife/household	
		12,782.05	Yale - daughter's tuition	
109,195.00	68,599.00	234,621.88		

Personal Expenditures	234,621.88	Personal Expenditures	234,621.88
LESS:		LESS:	
Sched. C Net Income	109,195.00	1040 Taxable Income	68,599.00
Difference	125,426.88	Difference	166,022.88

- Schedule C is 46.5% of what spent
- Spent 53.5% more than reported on Schedule C
- reported taxable income 29% of what spent
- spent 71% more than reported taxable income

1993

FORM 1040 REPORTED TAXABLE INCOME	OMITTED TAXABLE INCOME	SOURCE	EVIDENCE IN SAR
371,948.00	19,786.25	Mass Mutual (annuity cashed)	<ul style="list-style-type: none"> W1-4 1040 Tax Return pg. 4 line 37 SAR p 13 ¶ 11, pp 35, 36 & 55 discussion of Mass Mutual W22-1, 2, 3, 4 Ins. Agent Ornelas (10/3/96 and 10/29/96 interviews) 2/12/93 letter advising taxability and tendering checks, copies of checks and Fedex repts. W33-2 & 3 copies of Mass Mutual checks endorsed by Cisneros SAR pg. 35 par. 11 - 13 & W24-3 pg. 2 & 3 HGC tape disc. of tax effect of liquidating annuities with Medlar on 2/6/93 " " " "
371,948.00	36,367.98		

1040 Taxable Income 371,948.00

ADD:

Omitted Income 36,367.98

Corrected Income 408,315.98

9.8% unreported

CISNEROS TAX RETURNS
TAX YEARS 1989-1993
INFORMATION AVAILABLE TO ACC

FORM 1040

Tax Year	1989	1990	1991	1992	1993
Date Filed	10/11/90	1/21/92	8/20/92	2/15/93	4/14/94
Tax Preparer	Garza/ Gonzalez & Assoc., CPA	Garza/ Gonzalez & Assoc., CPA	Luis Hernandez, CPA	Luis Hernandez, CPA	Luis Hernandez, CPA
Wages (Line 7)	\$ 43,216	\$ 62,557	\$ 51,837	\$ 50,000	\$ 150,891
Schedule C Income (Line 12)	\$ 213,539	\$ 225,385	\$ 61,014	\$ 109,195	\$ 59,702
Schedule D - Capital Gain or (Loss) (Line 13)	\$0	\$ 0	\$ 0	\$ 0	\$ 103,085
Total IRA Distributions (Line 16)	\$ 2,618	\$ 0	\$ 0	\$ 0	\$ 12,896
Total Pensions & Annuities (Line 17)	\$ 0	\$ 0	\$ 25,000	\$ 0	\$ 52,340
Schedule E - Rents, royalties, etc. (Line 18)	- \$ 803	- \$ 364	\$ 2,627	\$ 2,376	\$ 3,936
Less: Keogh Retirement Plan & Self- Employed SEP Deduction (Line 27)	\$ 3,546	\$ 3,500	\$ 0	(\$30,000)	\$ 0
Adjusted Gross Income (Line 31)	\$ 256,531	\$ 285,669	\$ 142,040	\$ 130,471	\$ 382,344
Less: Itemized Deductions From Schedule A - Line 26 (Line 34)	\$ 12,582	\$ 11,070	\$ 25,781	\$ 50,372	\$ 10,396
Taxable Income (Line 37)	\$ 233,949	\$ 264,349	\$ 105,509	\$ 68,599	\$ 371,948
Less: Total Tax (Line 53)	\$ 69,443	\$ 76,888	\$ 30,151	\$ 23,461	\$ 118,386

Tax Year	1989	1990	1991	1992	1993
Net Disposable Income (Taxable Income Less Total Tax)	\$ 164,506	\$ 187,461	\$ 75,358	\$ 45,138	\$ 253,562
Less: Payments to Medlar (Based on information available to ACC by 3/27/97)	\$ 11,180 [REDACTED]	\$ 44,500 [REDACTED]	\$ 73,024.21 [REDACTED]	\$ 67,580 [REDACTED]	\$ 78,218.45 [REDACTED]
Amount Left to Feed Family	\$ 153,326	\$ 142,961	\$ 2,333.79	- \$ 22,442 (Negative)	\$ 175,343.55
Less: Non-Medlar Non-Deductible Personal Expenditures			\$ 70,769.41 (SAR-1991 HGC Quicken P&L) OR \$ 100,358 (SAR-Non-Hernandez)	\$211,166.65 (SAR -1992 Hernandez P&L/I&E) OR \$ 167,041.88 (SAR - Non-Hernandez)	
Amount Left Over			- \$ 68,435.62 (Negative) (SAR - 1991 HGC Quicken P&L) OR - \$ 98,024.21 (Negative) (SAR - Non-Hernandez)	- \$ 233,608.65 (Negative) (SAR -1992 Hernandez P&L/I&E) OR - \$ 189,483.88 (Negative) (SAR - Non-Hernandez)	

1993

FORM 1040 REPORTED TAXABLE INCOME	OMITTED TAXABLE INCOME	SOURCE	EVIDENCE IN SAR
371,948.00	19,786.25	Mass Mutual (annuity cashed)	<ul style="list-style-type: none"> • <u>W1-4</u> 1040 Tax Return p. 2 line 37. • <u>SAR p. 13 ¶ 11, pp. 35, 36 & 55</u> discussion of Mass Mutual • <u>W22-1, 2, 3, 4</u> Ins. Agent Ornelas (10/3/96 and 10/29/96 interviews) • 2/12/93 letter advising taxability and tendering checks, copies of checks and FedEx repts. • <u>W33-2 & 3</u> copies of Mass Mutual checks endorsed by Cisneros • <u>SAR p. 35 ¶ 11 - 13 & W24-3 pp. 2-3</u> HGC tape disc. of tax effect of liquidating annuities with Medlar on 2/6/93
	13,745.50	Mass Mutual (annuity cashed)	• “ ”
	2,836.23	Mass Mutual (annuity cashed)	• “ ”
371,948.00	36,367.98		

1040 Taxable Income 371,948.00

ADD:

Omitted Income 36,367.98

Corrected Income 408,315.98

9.8% unreported

CISNEROS TAX RETURNS
TAX YEARS 1988-1993
SCHEDULE A - ITEMIZED DEDUCTIONS

Tax Year	1988	1989	1990	1991	1992	1993
Real Estate Taxes (Line 6)	\$ 763	\$ 1,713	\$ 2,141	\$ 2,141	\$ 794	\$ 2,167
Other Taxes (Line 7)	\$ 0	\$ 0	\$ 0	\$ 8,229 "See statement"	\$ 49,635	\$ 0
Total Taxes (Line 8)	\$ 763	\$ 1,713	\$ 2,141	\$ 10,370	\$ 50,429	\$ 2,167
Total Itemized Deductions (Line 26) [same as Form 1040, Line 34]	\$ 13,117	\$ 12,582	\$ 11,070	\$ 25,781	\$ 50,372	\$ 10,396

SCHEDULE C
PROFIT OR LOSS FROM BUSINESS (SOLE PROPRIETORSHIP)

Tax Year	1988	1989	1990	1991	1992	1993
Gross Income (Line 5 or 7)	\$ 210,084	\$ 320,203	\$ 537,995	\$ 456,381	\$ 371,085	\$4,500
Total Expenses (Line 28, 29, or 30)	\$ 43,465	\$ 106,664	\$ 312,610	\$ 395,367	\$ 261,890	\$ 2,298
Net Profit or (Loss) (Line 29, 30, or 31) [same as Form 1040, Line 12]	\$ 166,619	\$ 213,539	\$ 225,385	\$ 61,014	\$ 109,195	\$ 2,202

SUMMARY

- Schedule C:
- 1991 (Quicken P&L): Schedule C is 42% of what spent; Spent 58% more than reported on Schedule C
 - 1991 (SAR - Non-Hernandez): Sched. C is 35% of what spent; Spent 65% more than reported on Sched. C
 - 1992 (P&L/I&E): Schedule C is 39% of what spent; Spent 61% more than reported on Schedule C
 - 1992 (SAR - Non-Hernandez): Sched. C is 47% of what spent; Spent 53% more than reported on Sched. C

- Taxable Income:
- 1991 (Quicken P&L): Reported Taxable Income 73% of what spent; Spent 27% more than reported Taxable Income
 - 1991 (SAR - Non-Hernandez): Reported Taxable Income 61% of what spent; Spent 39% more than reported Taxable Income
 - 1992 (P&L/I&E): Reported Taxable Income 25% of what spent; Spent 75% more than reported Taxable Income
 - 1992 (SAR - Non-Hernandez): Reported Taxable Income 29% of what spent; Spent 71% more than reported Taxable Income

- Disposable Income:
- 1991 (Quicken P&L): Expenditures exceeded disposable income by 48%
 - 1991 (SAR - Non-Hernandez): Expenditures exceeded disposable income by 57%
 - 1992 (P&L/I&E): Expenditures exceeded disposable income by 84%
 - 1992 (SAR - Non-Hernandez): Expenditures exceeded disposable income by 81%

Internal Revenue Service
memorandum

date: March 31, 1997

to: Chief Inspector
National Office

from: Chief, Criminal Investigation Division [REDACTED]
South Texas District

subject: Possible Improprieties by Assistant Chief Counsel (Criminal Tax)

Re: Henry G. Cisneros
[REDACTED]

An administrative criminal tax investigation of Henry Cisneros was initiated in late 1994 after the media reported that he had allegedly lied to the FBI during a background investigation to finalize his confirmation as Secretary of Housing and Urban Development (HUD). The alleged false statements were in regard to the amount and frequency of payments he had made to his former mistress, Linda Jones Medlar. Medlar was also a political fund raiser for Henry Cisneros.

The Office of Independent Counsel (OIC) has conducted their own investigation and inquiry into matters related to Cisneros. OIC independently requested expansion authority to include possible tax violations from two separate sources, a three judge panel and Attorney General Janet Reno. The OIC request was made on January 28, 1997. They are currently awaiting the court's order on both requests.

On December 20, 1996, the Criminal Investigation Division (CI) forwarded a Special Agent's Report and related exhibits to District Counsel, Austin, Texas, with a recommendation that criminal proceedings be instituted against Cisneros. The criminal investigation disclosed that Cisneros willfully filed false Federal income tax returns for the years 1991, 1992, and 1993 in violation of Title 26, U.S.C., Section 7206(1).

After the prosecution case had been forwarded to District Counsel, several incidents occurred which have caused CI to be highly concerned about possible improprieties in the office of Assistant Chief Counsel (Criminal Tax). Specifically, our concerns are: (1) Barry Finkelstein is reported to have a very "cozy" relationship

Chief Inspector
National Office

with Cisneros' defense counsel; (2) the case was pulled from the field with the apparent intent to "kill" it, regardless of the evidence and; (3) improper disclosures have possibly taken place with the Tax Division of the Department of Justice in a further attempt to stop the case from being prosecuted. Our observations and a discussion of these items are presented below:

1. Unprecedented Deviation from the Normal Review Process

The normal review process calls for the CI Chief to forward the prosecution case to District Counsel, after he/she concurs with the prosecution recommendation. If District Counsel concurs with the recommendation for prosecution; they then transmit the case to the Tax Division of the Department of Justice for their review.

James Macdonald, Assistant District Counsel, upon receipt of the Cisneros' case assigned District Counsel Attorney Thomas Eagan in Austin, Texas, to conduct the legal review. Eagan had substantially completed the review and had utilized Revenue Agent [REDACTED], detailed to District Counsel, to review the computations and method of proof. Macdonald was then contacted by Carl Knectel, Regional Counsel in Dallas, and requested to immediately furnish a copy of the Special Agent's Report (SAR) to Chief Counsel's Office in Washington, DC for their review.

Shortly thereafter, Macdonald notified CI that Chief Counsel had informed him they did not believe the case could be prosecuted. Chief Counsel stated there was double counting of income, errors in the special agents' computations, inappropriate method of proof, and an inability to establish willfulness on the part of Henry Cisneros. They also indicated a grand jury should have been utilized to tie down the witnesses. Chief Counsel's Office raised these concerns after only reading the SAR. Their determination had been made without any review of the exhibits, witness statements or analysis of the special agents' schedules.

→ Sometime on or before January 15, 1997, District Counsel was informed by Chief Counsel's Office that the case was to be transferred to the National Office. District Counsel was told this was necessary due to the sensitive nature of the case, which required a "centralized review." District Counsel was directed to cease their review, box up the exhibits and the report and mail it to Chief Counsel.

Chief Inspector
National Office

I am not aware of any other criminal tax cases that have been pulled from experienced District Counsel attorneys to be reviewed in Washington. It should be noted that District Counsel, based upon their review of the evidence and involvement in the case as it was being investigated, was supportive of the prosecution recommendation.

2. Apparent Failure to Consider Facts and Evidence

The decision to decline this case seems to have been made regardless of the evidence and facts. At the very beginning of the process, Barry Finkelstein, having only read the SAR, had also contacted National Office CI officials indicating the case could not be prosecuted due to the wrong method of proof being utilized, errors in computations and lack of evidence.

It is highly questionable and baffling as to why Chief Counsel's Office decided to extract a "sensitive" case from an experienced District Counsel, and assign the legal review to two attorneys (Martin Klotz and Martin Needles) who do not review criminal tax cases on a regular basis.

Martin Klotz informed the CI Group Manager and Special Agents that he did not have any accounting background and was relying on Martin Needles to conduct the financial analysis. Klotz further explained Chief Counsel recently hired Needles, and the Cisneros' case was his first case to review. Based upon the discussions the group manager and the special agents had with Klotz and Needles regarding methods of proof, it was apparent that neither attorney understood or had previous exposure with the bank deposits method of proof. It was also apparent that they had received their direction to kill this case from Barry Finkelstein at the outset.

Barry Finkelstein was never present during any of the meetings held to discuss the evidence. However, Martin Klotz constantly referred to "Barry this" and "Barry that." It is our concern that the Office of Assistant Chief Counsel (Criminal Tax), and Barry Finkelstein in particular, has not based the decision to decline this case on the facts and evidence.

In an effort to address the concerns and questions raised by Chief Counsel, CI flew the group manager and two case agents to Washington. On January 28, 1997, these three individuals met with Klotz and Needles. The manager and two special agents walked through the entire SAR and

Chief Inspector
National Office

evidence with Klotz and Needles. Klotz and Needles indicated to CI that all of their questions had been answered to their complete satisfaction, and they saw no errors in the computations or serious flaws in the case. However, after their subsequent discussion with Finkelstein on the morning of January 29, 1997, they reverted back to their original position that the case could not be prosecuted. Klotz indicated Finkelstein did not want to meet with the agents and that Finkelstein was the "deciding factor" regardless of what Klotz might think. Klotz then jokingly commented that he needed the job because his boys were in college. This comment has been interpreted to mean that Klotz has been directed by his superior and is fearful for his position.

Criminal Investigation requested, at the very least, to have the case returned for supplemental work to address any concerns Chief Counsel might have. Finkelstein refused to return the case.

There were a number of additional telephone discussions between Chief Counsel's Office and the investigating agents and group manager during the following weeks. The general purpose of these conversations was to answer questions and concerns raised by Counsel. In addition, a conference was held with defense counsel on February 12, 1997, wherein they presented to Chief Counsel their version of the events and their reasons why the government should not go forward with prosecution in this matter. CI did not receive a copy of this conference memo until March 7, 1997. A review of the conference memo disclosed that the defense submitted "a story" to Chief Counsel, which was an unfactual and unfounded version of the events. Chief Counsel immediately and wholeheartedly accepted the defense counsel view as the factual basis for declining this prosecution. They summarized their views in their memorandum dated March 7, 1997, and outlined their concerns with the case. This memorandum parrots the defense version and is replete with misstatements and false characterizations of the evidence and testimony.

In a final attempt to deal with the issues raised by Chief Counsel, the CI chief, group manager and one of the assigned special agents flew to Washington, DC. The Director of Investigations from Dallas joined them there for another meeting with Counsel. It should be noted that the original arrangement for this meeting was for Martin Klotz to fly to Austin. However, Finkelstein insisted that we "come to them" and thus forced four travelers to incur

Chief Inspector
National Office

airfare costs and per diem, instead of just one.

In this meeting which took place on March 18, 1997, Criminal Investigation pointed out to Klotz and Needles every piece of evidence that rebutted the defense counsels' presentation of the "facts" and the points raised in the Counsel memorandum of March 7. This meeting was to no avail since Counsel officially declined the case in their memorandum dated March 27, 1997. Their declination is nothing more than an enhanced version of the March 7th memorandum and a regurgitation of the defense characterization of the facts. They clearly did not consider the points raised during the meeting of March 18.

In summary, Chief Counsel's Office has consistently failed to rely upon the evidence showing Cisneros' guilt. The evidence shows Cisneros was involved in his tax affairs, and knowingly concealed substantial income in each of three years from his CPAs and the Internal Revenue Service.

3. Chief Counsel's Relationship with Defense Counsel

It has been reported that Barry Finkelstein has a cozy and/or close relationship with defense attorneys Cono Namarato and Chad Muller. Both of these individuals have been retained by Cisneros to represent him in the matters at hand. This relationship apparently has existed for a number of years and perhaps dates back to the time that Namarato and Muller were employed by the Tax Division.

Throughout their involvement in this process, Chief Counsel has wholeheartedly accepted and endorsed the defense version of events. As mentioned previously, the "story" which has been created, quickly falls apart when compared to the facts, testimony and evidence gathered during the investigation. In addition, when they write about and discuss the case, Chief Counsel exaggerates and misstates events to bolster the position they have taken. Their discussion of the case mirrors the position put forth by Cisneros' defense attorneys. It is not objective and unbiased. Examples of this conduct abound and include the complete discounting of the evidentiary value of the recorded conversations between Cisneros and Medlar and the insistence that Cisneros was completely unaware of office activities and the manner in which income was recorded.

On January 8, 1997, Group Manager Sheila Colbenson was contacted by Chad Muller, one of Cisneros' defense

Chief Inspector
National Office

attorneys. Muller requested a Chief's conference and indicated the agents had promised him an opportunity prior to forwarding the case to District Counsel (which was untrue). Muller indicated he had contacted District Counsel, and they did not have a problem with a District conference. It was explained to Muller the case had already been forwarded, and no conference would be held by Criminal Investigation at the District level. However, he could request a conference with District Counsel.

Sometime on or before January 15, 1997, District Counsel received notification to forward the complete SAR and exhibits to Assistant Chief Counsel. On January 21, 1997, Technical Assistant Martin Klotz informed the District of their concerns about the case. He also revealed Barry Finkelstein had agreed to a conference with defense counsel over a week earlier, and the conference had been scheduled for February 12, 1997. Therefore, it appears that Finkelstein had already agreed to and scheduled a conference with defense counsel prior to "taking" the case from District Counsel.

Another example of defense counsel's reliance on Finkelstein, is when the defense counsel made an oral and written request for the CPA's workpapers in order to prepare for the Chief Counsel conference. The District denied this request. The defense attorney's (Chad Muller) response was words to the effect "I'll just get those records from Chief Counsel then". Defense counsel sounded absolutely confident and assured that he would receive the documents and total cooperation from Chief Counsel's Office.

4. Chief Counsel's Disclosures to DOJ, Tax Division

In the meeting on March 18, 1997, Klotz explained to the Criminal Investigation Division that Stan Krysa, Department of Justice, Tax Division, had forwarded OIC's request to the Department of Justice for expansion of his investigation to include tax matters to Finkelstein. Krysa asked Finkelstein to review the request and give his opinion. Klotz stated Finkelstein opened the package and saw that it was grand jury material, he immediately closed the package and informed Krysa that he could not disclose anything related to a potential tax case, nor could he review the grand jury material.

However, District Counsel, Austin, Texas, recently informed Criminal Investigation Division that Stan Krysa,

Chief Inspector
National Office

Department of Justice, Tax Division, had asked District Counsel about the case involving the "secretary". Krysa stated he believed the case was not prosecutable. Krysa indicated he had meet with Cisneros' defense counsel and the Public Integrity Section of the Department of Justice on February 12, 1997. The purpose of that meeting was to discuss the Office of Independent Counsel's request to Attorney General Janet Reno for expanded authority in its investigation of Henry Cisneros.


Krysa also indicated CID was "dragging its feet" in responding to Chief Counsel's conference memorandum so that OIC could take jurisdiction. When Krysa was asked who told him that, he said he couldn't remember.

OIC informed Special Agent Lange of Attorney General Reno's initial written response to OIC's expansion request. The language used in Reno's response mirrors the language Finkelstein has given to CID for declining the case.

It is District Counsel's opinion that Krysa seemed to have "inside" knowledge from Assistant Chief Counsel (Criminal Tax) about the review of the case. It also appears that the possible disclosure by Chief Counsel, of their intentions to decline the case, has potentially influenced Reno's decision. Her decision should have been made independently and without knowledge of any tax investigation.

In conclusion, we raise these issues for your consideration because we have serious concerns about the propriety of the actions that have taken place in the review of this case. We are not privy to nor do we wish to speculate about personal or political motivations for the conduct that we have witnessed. The Criminal Investigation Division will protest the declination of the case. However, we strongly feel that the conduct of Assistant Chief Counsel (Criminal Tax) which preceded this declination needs to be examined.

We are elevating our concerns with full appreciation of the gravity of this situation. Please feel free to call me at [REDACTED] if you have questions or need additional information. Members of your staff may call Group Manager Sheila Colbenson at [REDACTED]


John J. Filan

Internal Revenue Service
memorandum

110

date: April 25, 1997

to: Assistant Commissioner (Criminal Investigation) [REDACTED]
National Office

from: Chief, Criminal Investigation Division [REDACTED]
South Texas District

subject: PROTEST OF DECLINATION MEMORANDUM

HENRY G. CISNEROS
[REDACTED]

We are protesting the declination memorandum issued by Assistant Chief Counsel (Criminal Tax) on March 27, 1997, for the above-named case. This document provides the basis for our protest and addresses the many erroneous conclusions and misrepresentations made in their analysis. These errors begin with the very first sentence of their background discussion and continue throughout their memorandum.¹ Assistant Chief Counsel (Criminal Tax) even misstates the origin of the case.²

DISCUSSION

When one removes the smokescreen created by defense counsel for a high profile individual, this turns out to be a very simple case. That is, a smart, well educated and successful man subverts the established recordkeeping system and diverts receipts for his personal benefit. In their discussion of the case, Assistant Chief Counsel (Criminal Tax) (hereinafter ACC) raises two basic issues: Willfulness and the Computation of the Criminal Omission of Income. Their major concern is whether it can be proven that CISNEROS' actions were willful and they assert that willfulness cannot be proven.

¹ Assistant Chief Counsel asserts that the case was forwarded for their review on 12/20/96. CID actually forwarded the case to District Counsel in Austin on this date. Assistant Chief Counsel later took the case from them during the week of 1/13/97.

² Counsel states that the IRS-CID investigation originated from information provided to the FBI during CISNEROS' background check in 1993. The IRS-CID administrative investigation was actually initiated after media reports about a civil lawsuit reporting CISNEROS made payments to his mistress, Medlar.

271

Assistant Commissioner (Criminal Investigation) [REDACTED]
National Office

An excellent definition of willfulness came out of the Spies case.³ It indicated that an affirmative willful attempt may be inferred from conduct such as keeping two sets of books, concealment of assets, covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. The facts and evidence that bear directly on the proof of CISNEROS' knowledge and willfulness are presented below:

CISNEROS' Knowledge and Willfulness:

ACC's memorandum essentially states that Cisneros was ignorant of what went on in his office and he entrusted his office management to employees without realizing they were not fulfilling his obligation to prepare and file complete and accurate returns. The facts in this case show just the opposite.

The reader should first refer to the Special Agent's Report (SAR), PP. 7 - 12 for CISNEROS' complete business history and work experience. This clearly demonstrates his knowledge and understanding of financial matters, detailed planning, and ability to manage many projects at one time (Attachment 1).

The following are highlights of the evidence, which exhibit CISNEROS' knowledge of his financial matters and direction given to his employees (additional points are noted in Attachment 1, SAR, P. 12).

1. When CISNEROS opened his private office in June 1989, he and Rene Gonzalez, CPA, worked together to establish sound office procedures. The most important procedure was to deposit all income [REDACTED]. Gonzalez stated there was no question everyone in the CISNEROS Communications office knew income checks needed to be deposited [REDACTED]. Under those procedures, Gonzalez was able to compare the details of the sources of income listed on the deposit slips to the Forms 1099 as a double check to ensure income on the Forms 1099 was all deposited.

272

³ Spies v. United States, 317 U.S. 492 (1943).

Assistant Commissioner (Criminal Investigation) [REDACTED]
National Office

2. When CISNEROS later retained Luis Hernandez as his CPA, CISNEROS told Hernandez, in June 1992, all employees knew all income was required to be deposited in the bank accounts in order for the income to be recorded for tax purposes [REDACTED]
[REDACTED]
3. CISNEROS had periodic conversations and written communications with Hernandez to keep abreast of the financial status [REDACTED]
[REDACTED]. The declaration memorandum asserted CISNEROS relied on others while he was traveling and away from home. However, the evidence shows, CISNEROS was active in the daily financial matters of his business:
 - a. CISNEROS directed his employees, specifically Ramirez, Arce-Garcia, [REDACTED], or Rosales, to make cash withdrawals [REDACTED]
[REDACTED]
 - b. CISNEROS was in control to the point of directing Arce-Garcia on which business bank account she should deposit the income checks to [REDACTED]
[REDACTED]
 - c. CISNEROS directed Arce-Garcia and Ramirez to withdraw cash from the bank or cash income checks to make deposits to Medlar's account [REDACTED]
[REDACTED]
 - d. CISNEROS directed Ramirez on whether Ramirez should withdraw cash, take "less cash" on a deposit, or use an income check to make deposits to Medlar's accounts [REDACTED]
[REDACTED]
 - e. Any decisions required to run the office were made by CISNEROS [REDACTED]
 - f. CISNEROS was so involved in the Communication's business financial matters he had weekly income projections and controlled which bills were paid:

Assistant Commissioner (Criminal Investigation) [REDACTED]
National Office

- (1) CISNEROS used Arce-Garcia's green ledgers to project future income from speeches. Arce-Garcia provided them to CISNEROS whenever he asked for them. [REDACTED]
- (2) CISNEROS was aware of how the internal office system worked from its inception in June 1989 [REDACTED]
- (3) When [REDACTED] was responsible for entering the check register into the Quicken Program in 1990, [REDACTED] provided CISNEROS a copy of each week's check register transactions on each Monday for his review [REDACTED]
- (4) When [REDACTED] was responsible for the check register in 1991, she provided a report to CISNEROS each week of the expected income and bills due. CISNEROS told [REDACTED] which bills to pay [REDACTED]. CISNEROS complained if moneys due in were not received timely [REDACTED]
- (5) When Rosales was responsible for the check register in the last quarter of 1992, he provided CISNEROS reports of bills due [REDACTED]. CISNEROS directed Rosales regarding which bills to pay [REDACTED]
4. CISNEROS told the investigating agents he was "always very careful to review his tax records" [REDACTED]
5. CISNEROS stated he was "meticulous, scrupulous and uncompromising in making sure everything was reported for taxes" [REDACTED]
6. CISNEROS exhibited a working knowledge of the difference between gross and net income for tax purposes when he stated, in 1990, he would have to make at least \$65(000) to \$80(000) before taxes to net the

Assistant Commissioner (Criminal Investigation) [REDACTED]
National Office

\$48,000) he paid to Medlar [REDACTED]
[REDACTED]

7. CISNEROS paid a total of \$111,588 to his wife (MARY ALICE), Lincoln Benefit, and school tuition in 1991 when he only reported \$105,509 in taxable income. He paid an additional \$73,024 to Medlar in 1991. CISNEROS' reported taxable income would not have covered his personal expenditures, even before considering the payments to Medlar (Appendix B-1; Attachment 2; [REDACTED])
8. CISNEROS paid a total of \$88,520 to his wife (MARY ALICE) and for school tuition in 1992 when he only reported a taxable income of \$68,599. In addition, he paid \$67,580 to Medlar. The reported taxable income did not cover CISNEROS' personal expenditures before considering the payments to Medlar (Attachment 3; Appendix B-1; [REDACTED])
9. Anna Maria Ornelas, CISNEROS' insurance agent from May 1991 through 1993, explained the tax effect of CISNEROS' contributions to his annuities, retirement accounts, and distributions from the accounts, to CISNEROS [REDACTED]. CISNEROS had a very thorough understanding of his policies and did not require a Form 1099 to determine the taxable nature of distributions [REDACTED]. Ornelas sent CISNEROS a memo with the distribution checks from his annuities indicating the taxable nature of the distributions in 1993 [REDACTED]
10. CISNEROS wired money to Medlar in increments under \$10,000 and stated a larger amount would set off alarms because of the drug laws, and he was sure it (cashing in annuities) would be a big tax problem for him [REDACTED]
[REDACTED]
11. CISNEROS stated his payments to Medlar "...get to you (Medlar) before they get to the system," and the accountant, Hernandez, would not know [REDACTED]
[REDACTED]
[REDACTED]

Assistant Commissioner (Criminal Investigation)
National Office

The "System":

The ACC's office has asserted all records were available to the accountants, and therefore, no willfulness can be attributed to CISNEROS because he was relying on the accountants and his office staff. This is clearly erroneous. The following discussion presents the facts regarding the office system of keeping records.

The primary source of income for CISNEROS Communications was from speeches for numerous organizations [REDACTED]

[REDACTED]. CISNEROS also received income from director's fees and travel reimbursements [REDACTED]

[REDACTED]. The organizations were required to pay half the fee up front and the remaining half after the speech [REDACTED]

As discussed above, it was well known since the June 1989 opening of his private office, by CISNEROS and all the employees that all income was to be deposited.

Arce-Garcia kept track of future speeches by noting them in her green ledger on the page of the month the speech was to be performed [REDACTED]

[REDACTED]. The payments received were noted by the name of the organization on the page of the month the speech was to be performed in, not in the month the payment was received [REDACTED]

A comparison of the green ledgers and the bank deposit source items reveals that in a particular month of the green ledger, the list of speeches and income does not tie to the bank deposits. The names of the organizations in the ledger often differ from the names of the organizations in the source items. The notations in the green ledger do not tie to the dates the source items were deposited [REDACTED].

Arce-Garcia said she provided copies of her ledgers to the CPAs for the tax returns [REDACTED]. But, [REDACTED], the accountant who performed the work on the CISNEROS books with Gonzalez, said there was no information, other than

Assistant Commissioner (Criminal Investigation) [REDACTED]
National Office

the bank accounts, given to identify individual income items
[REDACTED]

Hernandez stated he did not receive Arce-Garcia's ledgers for use in preparing the tax returns [REDACTED]. Arce-Garcia, when asked again, stated she gave the ledgers to Ramirez at the end of the year. She would also give the ledgers to CISNEROS to use for income projections [REDACTED]
[REDACTED]

CISNEROS asked Hernandez to help figure out his cash flow [REDACTED]. Arce-Garcia stated there was no pattern to providing Hernandez the copies of the income projections [REDACTED]. The cash projections Hernandez did see indicated more than enough monthly income to cover the monthly expenditures listed by CISNEROS and Ramirez [REDACTED]
[REDACTED]

Hernandez suspected something was wrong because there was a difference in the income in the bank accounts and the income projections [REDACTED]. When Hernandez asked Arce-Garcia to explain her system of tracking the receivables, she showed him her green ledgers. Hernandez could not reconcile the green ledgers to the bank accounts [REDACTED]

It must be noted, Gonzalez and Hernandez never had the deposit source items to assist them in ever beginning a comparison to the green ledgers. Hernandez told Arce-Garcia her green ledgers were not adequate, and he could not determine the income from her ledgers, nor could he tie bank deposits back to the green ledgers [REDACTED]

Hernandez asked Arce-Garcia six times, from May 1992 through September 1992, to identify sources of income on the deposits [REDACTED]. Hernandez provided Arce-Garcia two different formats to use so deposits would be identified and the green ledgers would tie to deposits [REDACTED]. Hernandez told Arce-Garcia, if income was received in the amounts shown on her ledgers, there should not be a problem paying the bills [REDACTED]

Hernandez had no success in getting Arce-Garcia to identify the source of income on the deposit slips. He discussed the problem with CISNEROS, but CISNEROS brushed him off and told

Assistant Commissioner (Criminal Investigation)
National Office

him just to work it out with Arce-Garcia. Hernandez was frustrated by the lack of cooperation in getting the deposits identified.

Hernandez did not know CISNEROS was making payments to Medlar [REDACTED]. Arce-Garcia stated CISNEROS never instructed the employees to follow any of the suggestions made by Gonzalez or Hernandez, though CISNEROS had stated he wanted to make the system of records better for tax purposes [REDACTED].

Tax Return Preparation 1991:

Rene Gonzalez maintained the books and records through 1991 and prepared CISNEROS' personal tax returns for the years 1976 through 1990 [REDACTED]. Gonzalez did not charge CISNEROS for the accounting services or tax return preparations. However, Gonzalez did charge for the services he provided to CISNEROS Asset Management Co., owned primarily by CISNEROS and two others [REDACTED].

[REDACTED] The ACC's office has implied Gonzalez is not a good witness or return preparer because he was "free help". The undisputed fact is that Gonzales established a workable system to record and report CISNEROS' income based on the bank deposits.

Luis Hernandez maintained CISNEROS' books and records for 1992 to the present and also prepared CISNEROS' personal tax returns for 1991 through 1993 [REDACTED].

The income for tax purposes, for 1989 and 1990, was calculated based on the bank deposits by [REDACTED] an accountant working for Gonzalez [REDACTED]. Gonzalez' workpapers indicate [REDACTED] asked for the information to identify any deposits not previously identified and asked for the remaining bank account information to finish the 1991 financial statements.

CISNEROS did not inform Gonzalez' firm that all income was not deposited [REDACTED]. If an income check was not deposited, there was no way for Gonzalez or [REDACTED] to include it in income [REDACTED].

Gonzalez [REDACTED] relied on the fact CISNEROS and his office employees all knew income needed to be deposited into the

Assistant Commissioner (Criminal Investigation) [REDACTED]
National Office

business accounts [REDACTED]
[REDACTED]

Gonzalez could have prepared an accurate return for CISNEROS for the year 1991, if CISNEROS had provided the information he was asked for by [REDACTED]. Bank deposits had already been identified to Gonzalez and the financial statements could have been completed once the requested records from CISNEROS were received by Gonzalez for 1991. [REDACTED]

Instead, CISNEROS and Ramirez provided Hernandez with a one page Quicken Profit and Loss form and Forms 1099 for the 1991 income and expense information [REDACTED]
[REDACTED]

The workpapers from Gonzalez were not delivered until August 1992 [REDACTED]. In the meantime, CISNEROS told Hernandez the 1991 records from Gonzalez were incomplete and Hernandez could not use them [REDACTED].

CISNEROS and Ramirez told Hernandez what made up the income and expense categories on the one page Quicken sheet [REDACTED]. Hernandez understood the income reported on the Quicken sheet was inaccurate because CISNEROS and Ramirez told Hernandez transfers from CISNEROS' accounts were improperly included in income and, as a result, income was overstated on the Quicken sheet [REDACTED]. Hernandez utilized the only other information given to him by CISNEROS, the Forms 1099 plus certain income categories for the 1991 tax return [REDACTED].

Due to CISNEROS not providing complete records, for 1991, and not having the bank statements available for 1991, Hernandez was also unable to recognize that taxable income was not always deposited as CISNEROS had told him [REDACTED]. Hernandez discussed the 1991 return with CISNEROS and told CISNEROS he wanted to go back through any and all available records for 1991 to make sure it was accurate. CISNEROS told him not to do it [REDACTED]

In summary, for 1991, Hernandez did not have the 1991 bank statements available to him. He did not have any backup documentation for the 1991 Quicken statement. He did not have Arce-Garcia's green ledgers to use for 1991, and he had already

Assistant Commissioner (Criminal Investigation)
National Office

determined, in his 1992 work, the ledgers could not be reconciled to the information he was given. Hernandez was given Forms 1099, a one page Quicken statement, and told he could not use the prior accountant's workpapers because they were incomplete.

Tax Return Preparation 1992:

The ACC's office asserts Forms 1099 were used to prepare the 1992 return. This is incorrect. The 1992 return was prepared by Hernandez using only the bank deposits [REDACTED]; [REDACTED]. No personal household or joint bank accounts from Westside Bank or City Employees Federal Credit Union were included in Hernandez' analysis because CISNEROS told Hernandez those accounts were only used by MARY ALICE [REDACTED]. However, CISNEROS did deposit income items into those accounts [REDACTED].

The deposit slips were not identified with the source of the deposits, so Hernandez treated all unidentified deposits as income for the year 1992 [REDACTED]. As was already discussed above, Hernandez only used Arce-Garcia's green ledgers in his attempt to find out why there was a difference between the bank deposits and the cash flow income projections.

Since Hernandez could not get Arce-Garcia, Ramirez, and CISNEROS, to identify the source of the income on the bank deposits or change the way the green ledgers were noted, he relied on CISNEROS' statement that all income was deposited. Hernandez had no reason to believe it was not true [REDACTED].

The Forms 1099, for 1992, could not be individually compared to the bank deposits since the deposits were not identified [REDACTED]. Therefore, Hernandez compared the total of the Forms 1099 to the total from the bank deposits for the year and used the larger figure for income which was the bank deposits for the year [REDACTED].

If income was not deposited, Hernandez would not know unless CISNEROS, Ramirez, or Arce-Garcia informed him [REDACTED]. Hernandez stated no one ever told him that any income checks were being cashed and/or not deposited [REDACTED].

Assistant Commissioner (Criminal Investigation)
National Office

The itemized category report for 1992 generated by Hernandez' Quickbooks information revealed there were no deposits after 10/5/92 [REDACTED]. The understatement of income for the last quarter of 1992 was not addressed in the ACC's declination memorandum (Attachment 5).

CISNEROS told Hernandez, approximately September 1992, there would be no more income after the first part of October 1992, because CISNEROS was heavily involved in President Clinton's campaign [REDACTED]. Hernandez asked for the bank statements for the last quarter of 1992, but he did not receive them [REDACTED], and SubExhibit 4). Therefore, Hernandez took CISNEROS' word that there was no income in the last quarter of 1992 [REDACTED].

CISNEROS explained the makeup of his annuities to Hernandez [REDACTED]. CISNEROS told Hernandez the contributions to Lincoln Benefit were for a SEP retirement plan. As a result, Hernandez deducted payments from CISNEROS as a Self-Employment Plan (Attachment 6: [REDACTED]).

Tax Return Preparation 1993:

CISNEROS divested himself of his assets and ownership in corporations during 1993 as a result of his appointment as Secretary of HUD [REDACTED].

Hernandez used the Forms 1099, Forms 1099R, annuity closing statements, discussions with the broker on stock sales, and information provided by CISNEROS regarding distributions, to prepare the 1993 tax returns with regard to assets sold [REDACTED]. Hernandez used the Forms 1099 provided by CISNEROS to determine Schedule C income from director's fees and speaking fees for 1993 [REDACTED]. CISNEROS did not provide the bank statements for any account to Hernandez for the 1993 return.

Corrected Taxable Income:

In this section, it is necessary to point out the false presumptions used by the ACC to arrive at an incorrect premise regarding what makes up the case against CISNEROS (Attachment 5, Pg. 12). To explain the significance of the difference between ACC's focus and the reality of what happened, it is

Assistant Commissioner (Criminal Investigation)
National Office

imperative to have a factual understanding of how the correct income was computed by the agents. For 1991 and 1992, a bank deposits method was used to compute corrected taxable income (Attachment 1, SAA, pp. 29 - 32; Appendix B-1 - B-4; [REDACTED]). The bank deposits method was used because that was the system used by the accountants who kept the books and records since 1989. The bank deposits computation used is as follows:

Add all deposits
Plus all items which did not go into the bank accounts
Plus all cash expenditures
Minus all cash withdrawals up to the amount of cash
deposited plus cash expenditures
Minus loans deposited, transfers between accounts,
and other non-business deposits
Equals Correct Gross Receipts for Schedule C

The calculation of corrected gross receipts is the first step to determine if there is a false matter and if the matter is material. The establishment of those two facts is the only question the bank deposits computation is designed to answer. The list of specific income items cashed is only a part of the calculation.

A comparison of the total of correct gross receipts to reported gross receipts reveals there is over \$107,000 for 1991, and over \$111,000 for 1992, in unreported gross receipts. The CID investigation revealed that CISNEROS willfully and knowingly filed a tax return where gross receipts were substantially understated by those amounts.

Contrary to what ACC suggests, CID does not propose that the evidence of a false material matter lies squarely on CISNEROS' actions to cash checks. To focus narrowly on cashed income checks ignores the larger part of the evidence and it also ignores the largest part of what makes up the amount of the false matter. Specifically, the false material matter for 1991 was \$107,052.66 and the cashed checks amount to \$37,893.12. In 1992, the false material matters (unreported receipts and a \$30,000.00 false deduction) amount to \$141,290.78 and the cashed checks total \$32,015.00.

CISNEROS knew all of his income was tracked through his bank accounts for tax purposes. This was the only system, known by the CPAs since 1989, where CISNEROS' income was recorded. The

Assistant Commissioner (Criminal Investigation)
National Office

CID investigation included detailed analysis and over 180 organization contacts that determined CISNEROS had cashed income checks. CISNEROS knowingly and willfully cashed income checks that he knew would bypass the bank deposits used by the CPAs to report gross receipts. This is only one way in which CISNEROS bypassed the system and caused the returns to be false.

CISNEROS' act of cashing income checks in 1991 resulted in the cashed items of income not being reported in the records provided to Gonzalez. If CISNEROS had provided Gonzalez the final records for 1991 and Gonzalez had actually prepared a 1991 tax return, then the unreported income could have been calculated using the specific items method. Gonzalez never used Forms 1099 to report income for tax purposes since the total of Forms 1099 was always substantially less than income deposited in the bank accounts. Therefore, the specific items unreported would have been the items which had been cashed since they were not included in the bank deposits used by Gonzalez.

However, as discussed above, CISNEROS did not allow Gonzalez to prepare the 1991 return. His acts and words led Hernandez to believe the bank deposits on the one page Quicken P&L were overreported and caused Hernandez to have to rely on Forms 1099 and other income items to arrive at gross receipts. CISNEROS never put Hernandez in a position to allow him to prepare a correct 1991 tax return. CISNEROS allowed Hernandez to believe Forms 1099 would account for the bulk of his income when he well knew that he had substantially more income.

Hernandez' reliance on CISNEROS' words about the Forms 1099 resulted in some of CISNEROS' cashed income to appear to be reported on the 1991 return. Since there is no actual 1991 records to show exactly how the 1991 income was calculated, there is some question about exactly what item is and is not on the tax return. How does ACC know that an item was reported on the 1991 return? The answer is that they don't know.

The ACC is factually incorrect when he says the 1992 return was prepared using the Forms 1099. The 1992 return was prepared by using only the bank deposits. As discussed above, there was no ability for Hernandez to arrive at a correct income using the Forms 1099 or the green ledgers. This means that the ACC is wrong when he suggests individual cash items were actually

Assistant Commissioner (Criminal Investigation)
National Office

reported on the 1992 return. Unlike the obfuscation that existed in 1991, 1992 was clear, Hernandez could only use what was in the bank deposits to calculate gross receipts.

In addition, when the ACC stated the 1993 specific items cashed were already, and properly reported in 1992, he is incorrect. The 1993 specific items were not included in the 1992 bank deposits and therefore, were not on the 1992 return. Further, since CISNEROS is a cash basis taxpayer and the evidence shows he received and negotiated the items in 1993, the items are properly reportable in 1993 not in 1992, or in 1991 as in the example of the \$1,000 Harvard item. The year in which an organization reported the Form 1099 is of no consequence to a cash basis taxpayer who does not actually receive the income until a subsequent year.

An additional false material matter on the 1992 return is the deduction of \$30,000 a Self-Employed Pension Plan. This will be discussed later.

One of the false material matters on the 1993 tax return is the gross receipts on CISNEROS' Schedule C, caused by CISNEROS' failure to include all business receipts in the information provided to his CPA. An additional false material matter on the 1993 return is the total pensions and annuities distributions on CISNEROS' first page of the return, caused by CISNEROS' failure to include all taxable annuity distributions in the information provided to Hernandez. This will also be discussed later.

Additional Items Relating to Willfulness:

While failure to report income is not, by itself, proof of intent to defraud, consistent failure to report substantial amounts of income over the years is significant proof of intent to defraud (Gromacki, 361 F.2d 727 (7th Cir. 1966)). As for CISNEROS' reliance on others, if a taxpayer does not supply all relevant information to the preparer, there can be no innocence claimed due to reliance on the preparer (Korecky, F.2d 1566 (11th Cir. 1986)).

The ACC's office asserts CISNEROS had a good faith reliance on others (i.e. employees and CPAs). This is false because the "others" all say very clearly that it was CISNEROS who directed their actions. CISNEROS was the one person with a duty to

Assistant Commissioner (Criminal Investigation)
National Office

provide his accountants with all relevant information and failed to do so.

CISNEROS' state of mind, to have acted willfully, must be determined from all evidence available. Chief Counsel's Office only appears to be considering the "facts" which the defendant's attorneys are putting forth. This investigation has established CISNEROS' willfulness by showing that his words and acts constitute lies, misstatements and acts of concealment. Consider the following examples:

1. The ACC excludes CISNEROS from any process involving the creation of his financial records, communication to Hernandez, and preparation and filing of the tax returns. However, the evidence shows CISNEROS was involved in the daily direction and control of his employees and his financial matters. The evidence also shows CISNEROS has a working knowledge of his tax returns.
2. Testimony of numerous witnesses and corroborating documents show that CISNEROS knew under the system, established by Gonzales, all income checks had to be deposited into his bank account in order to be included on his income tax returns. Knowing this he subverted and bypassed the system.
3. The investigating agents specifically asked if he had reported all of his income. CISNEROS stated he was "meticulous, scrupulous, and uncompromising in making sure everything was reported for taxes." The evidence shows that this was a false statement. In an evasion case, this lie would be construed as an overt act.
4. CISNEROS also admitted to carefully reviewing his own returns [REDACTED]; and yet, the returns, as filed, contained items which were materially false.
5. CISNEROS started cashing income checks in mid-1991. He concealed this fact from Gonzalez and Hernandez. In 1989 and 1990, the deposited income was greater than the total of Forms 1099 received. Gonzalez used bank deposits to report income and CISNEROS knew it.

Assistant Commissioner (Criminal Investigation)
National Office

6. The taxable income on the returns for 1991 and 1992 equaled substantially all the income CISNEROS had available to pay for his nondeductible expenditures. CISNEROS had the knowledge and detailed control of his financial matters. The result is CISNEROS, after carefully reviewing his tax returns, filed returns which did not report enough NET to cover his own personal expenditures plus payments to Medlar.
7. CISNEROS changed accountants during the 1991 filing season and did not provide Gonzalez with the records needed to finish the 1991 financial statements and tax returns. Instead of allowing Gonzalez to finish the 1991 records, CISNEROS hired Hernandez in April 1992. CISNEROS explained how income was handled to Hernandez as discussed below:
 - a. What CISNEROS said, was that he and all the employees knew income had to be deposited in order to be reported for tax purposes. He did not tell Hernandez that not all income was deposited and Hernandez would have to use additional records. It was CISNEROS who explained Arce-Garcia's green ledgers as being a method she used to ensure receivables were collected.
 - b. It was CISNEROS and Ramirez who met with Hernandez to explain the one page Quicken Profit and Loss form to Hernandez. It was CISNEROS and Ramirez who explained that transfers between accounts had been included in income on the Quicken page causing it to be overstated. It was CISNEROS who told Hernandez that Gonzalez' workpapers could not be used because "they didn't really have a CPA in 1991" and the records were incomplete.
 - c. Therefore, Hernandez could not use the one page Quicken for income, could not use Gonzalez' "incomplete" records, knew Arce-Garcia's green ledgers were for receivables only, had not even seen the green ledgers at the time he was meeting with CISNEROS and Ramirez, and did not have the bank statements for 1991. Hernandez had the 1990 and 1989 return and the 1991 P&L and Forms 1099. Hernandez was left with being able to only use the

Assistant Commissioner (Criminal Investigation)
ational Office

Forms 1099 plus additional figures to make a good faith estimate of income for 1991. It was fully within CISNEROS' power to have had a correct return prepared.

- d. Hernandez then told CISNEROS he wanted to go over everything for 1991 and CISNEROS would not authorize it (Attachment 4, P. 33). Based on what CISNEROS told him about the Quicken P&L, Hernandez understood that income was probably overreported.
8. CISNEROS told Hernandez he never deposited any income into the household account [REDACTED]. Yet, CISNEROS did deposit income into the household account [REDACTED]. This is an outright lie by CISNEROS.
9. CISNEROS did not tell Gonzalez and Hernandez he was making payments to MEDLAR. Gonzalez and Hernandez did not know, from all the systems available, about the payments to MEDLAR [REDACTED].
10. CISNEROS had shared intimate details with Hernandez regarding the possibility of divorcing MARY ALICE and child custody (Attachment 7). It appears CISNEROS was not concerned with Hernandez not keeping the details of CISNEROS' business and personal life confidential. Since confidentiality was not the problem, there is no other reason to conceal the payments to Medlar from Hernandez other than to conceal it from the tax return calculation of income.
11. CISNEROS circumvented the bookkeeping system in many ways and did not tell Hernandez about it. He did not tell him that income checks were not being deposited into the business accounts; that income checks were deposited to Medlar's accounts; that income checks were deposited to personal accounts; that income checks were used to make note payments; or even that CISNEROS was making payments to Medlar [REDACTED].
12. CISNEROS also asked Hernandez to help him with his cash flow problem, but never revealed the large expenditures he was making to Medlar, thus making it impossible for

Assistant Commissioner (Criminal Investigation)
National Office

Hernandez to figure out why the income projections did not cover the expenditures CISNEROS had revealed. Hernandez was at a loss to explain why there would be a cash flow problem since the income projections that totaled over \$400,000 per year were enough to cover the expenditures CISNEROS said he had. What Hernandez did not realize was that CISNEROS had not informed him of all his obligations (i.e. Medlar).

13. When Hernandez started checking up on what was used to arrive at the income projections, he discovered the records used for income projections did not tie to the bank deposits. Although Hernandez was supposedly hired by CISNEROS to improve the system, when Hernandez discussed the problems with CISNEROS, CISNEROS refused to make any change. In fact, CISNEROS never made one change, suggested by Hernandez, to any of his procedures to improve the quality of the system.
14. CISNEROS intentionally omitted approximately \$100,000 from the 1992 return by telling Hernandez no income existed during the later part of the year and by not providing the bank statements. CISNEROS was singularly responsible for this omission.
15. When CISNEROS was recorded by Medlar in 1992, the concealment and underreporting had already begun. CISNEROS' own words in 1992 reveal he was thinking of the IRS and taxes in continuing the concealment when he was considering the movement of money to pay Medlar

- [REDACTED]
16. Recorded statements by CISNEROS include many comments to evidence CISNEROS' bad purpose and state of mind. Such phrases include: "It gets to you before it gets to the system," "...can't move large sums of money around without the IRS and bank examiners or somebody taking note of those volumes...", "...there are problems with large amounts because of the drug laws...", "the accountant would not know...", "...whether he (Hernandez) knew of any payments, and he said he didn't because he doesn't, he doesn't get involved in that, he accounts with the accounts for the money that we put into the system and the money I help you with comes

Assistant Commissioner (Criminal Investigation) [REDACTED]
National Office

before that, comes out of that before it gets to him...," "... I'm sure it's a big tax problem for me...," "need to make at least 65 to 80 to net the 48...," "...told him it came to 10 or 15,000 a year (lie to the Presidential Transition Team)...," regarding an argument between CISNEROS and his wife about the FBI questions, "...she played along like she knew..."

17. The ACC's office asserts the conversation where CISNEROS tells Medlar the payments get to Medlar before they get to the accountants only serves as evidence that payments to Medlar existed. The ACC's interpretation is the statement does not mean by concealing the payments from the accountants it would also cause the tax returns to be materially false (Attachment 5, Footnote 5; [REDACTED]). This is an incredible conclusion. In light of all the other evidence, the statement means what it says. The meaning is that money that went to Medlar came from funds that did not get to the system, and therefore, the accountants could not account for it. Neither accountant ever knew, from all the records available to them, the expenditure to Medlar existed.

Additional Inaccuracies in Declination Memorandum:

1. The ACC's office has fixated on Appendix D 4, Specific Items Not Deposited, and espoused the view that this schedule summarizes the totality of the unreported income. accusation against CISNEROS. This is incorrect. Appendix E-4 is no accusation, it is one example, among many, of CISNEROS' willfulness by his failure to deposit all income, and it is simply a part of the calculation of correct income for 1991. The specific income items that were not deposited are only one part of the computation for total corrected gross receipts. It is the total understatement of gross receipts, not any one particular item, which makes up the false material matter.
3. The ACC's office is incorrect in their assertion that the 1992 return was prepared using the Forms 1099. The 1992 return was prepared by Hernandez based on the bank deposits only. Hernandez could only compare the totals of the Forms 1099 to the total of the bank deposits because CISNEROS would not direct his employees to identify the source of income on the deposit slip when

Assistant Commissioner (Criminal Investigation)
National Office

asked to do so by Hernandez. In addition, as discussed above, Hernandez could not use the green ledgers and CISNEROS knew it.

4. The ACC's office is incorrect in their assertion the 1993 return income is overstated by the agents because some of the items were already reported in 1992. Since 1992 was prepared using only the bank deposits, the income listed on Forms 1099 for items negotiated in 1993 were not reported on the 1992 return. Additionally, CISNEROS is a cash basis taxpayer and did not negotiate any of the items of income until 1993, therefore, the items are properly reportable in 1993.
5. CISNEROS is a cash basis taxpayer. As such, his correct gross receipts should reflect the income he actually received and had unrestricted access to in each calendar year. If an income item is dated 12/31/92, but not received until 1993, as evidenced by the dates the funds were negotiated and distance between the payer and CISNEROS, then it is properly reportable in 1993. Even if the payer sent a Form 1099 in 1992, it is still reportable in 1993 under the cash basis system and in this example.
6. The ACC's office maintain the sources of funds for payments to Medlar existed in either the bank deposits, Forms 1099, or the green ledgers. The ACC states this means Hernandez had reason to know and is at fault and not CISNEROS. The ACC's office also asserts if an item is in one of the three places, CISNEROS is not at fault. As discussed above, it is only correct to say that Hernandez did not know, and could not have known, by any of the records in existence that funds were not reported.
8. The ACC's office contend that the SAR states CISNEROS tried to hide the transactions from his employees. This is wrong. The SAR is quick to point out that without loyal employees, who are currently provided legal counsel hand-picked by CISNEROS' attorneys, the CPAs might have been able to discover the unreported income.
9. The ACC's office is incorrect in their assertion Gonzalez used Forms 1099 to prepare the income on the

Assistant Commissioner (Criminal Investigation)
National Office

tax returns for prior years. Gonzalez always prepared the tax returns based on the bank deposits since CISNEROS went into business in 1989. CISNEROS was fully aware of this fact.

Defense Counsel's "Analysis":

Defense counsel analyzed Medlar's bank deposits and argued that all the money to Medlar was either in Arce-Garcia's log or in the Forms 1099, or the bank deposits (Attachment 8, Defense Conference Memorandum, P. 3; Attachment 9 and 10, Defense analysis of payments to Medlar). The schedules first identify deposits to Medlar's bank accounts which defense identifies as from or on behalf of CISNEROS. The defense also notes who made the deposit and has a column to identify, based on their version of "the system," the source of the deposits.

The agents analyzed the green ledgers, Forms 1099, and bank deposits, in the same format as was available to Hernandez, to determine the possibility of accurately and reasonably arriving at unreported income and to check the defense exhibits' accuracy.

The agents' analysis reveals the green ledgers do not support any correct calculation of income (Attachment 11). The defense schedules are inaccurate as to items identified as the source of CISNEROS' payments to Medlar, as to amounts, and double counted income items which had been overlooked. Hernandez could not have used the green ledgers to compare with the bank deposits, as they existed, to arrive at a correct income calculation.

It took CID over 180 interviews and many months of obtaining source documents to be able to identify the specific items that had been cashed. It was not the green ledgers which identified the items.

Distributions from Massachusetts Mutual IRA Account:

Regarding the Mass Mutual distribution in 1993, CISNEROS directed that the money from the annuities, be Federal expressed to Frank Wing at WMD. to ensure no one opened the mail and CISNEROS would get the money [REDACTED]. CISNEROS was reminded by Ornelas to give the information to his accountant in a memo [REDACTED]. When the transaction occurred in 1993, Hernandez

Assistant Commissioner (Criminal Investigation)
National Office

was still working on collecting the information for the 1992 return. CISNEROS could have faxed the information for 1993 at the same time he received the money.

In addition, the public financial statements don't show Hernandez had notice of the distribution or notice he should have questioned anything. The public financial statement asks for a list of all assets and sources of income over \$200 for the year 1993. There is no disclosure of any of the items of income over \$200. In addition, the only statement Hernandez had to tell him anything about Mass Mutual was a FMV statement as of 1/24/94, which showed a value in one of the accounts. This FMV notice had been sent to the same address used for the Forms 1099, CISNEROS' San Antonio residence, and Hernandez got this form.

The ACC's office asserted the Forms 1099 were not received by CISNEROS since the address used to send the Forms 1099 were the [REDACTED] address and the CISNEROS BENEFIT GROUP, INC., address [REDACTED]. However, every other 1099, W-2, and miscellaneous item related to income seemed to get into the hands of Hernandez, regardless of the address where the forms were sent. MARY ALICE's sister, [REDACTED] watched the house on [REDACTED] for CISNEROS. [REDACTED], and Anna Marie Cnelas were at CISNEROS Benefit Group and served to gather mail for CISNEROS. There is no defense in the fact the forms that Hernandez did not get were sent to his San Antonio residence (Attachment 12, PP. 1 - 8).

Self Employment Pension Plan Deduction:

Regarding the deduction of \$30,000 as a Self-Employment Pension Plan on the 1992 returns, Hernandez' affidavit signed 2/4/97, stated he deducted the Lincoln Life payments on his incorrect assumption that there was a retirement account (Attachment 6).

In contrast, Hernandez told agents he asked CISNEROS, Arce-Garcia, and Ramirez about the Lincoln Life payments and was told by all three that it was a retirement plan. Hernandez said it would have also been covered in the tax planning meeting with CISNEROS [REDACTED]

The statements are in direct conflict. The only way to resolve this issue is to have Hernandez testify in a grand jury.

Assistant Commissioner (Criminal Investigation)
National Office

Tape Recordings

The ACC's office expressed doubt on the use of the tapes and use of Medlar as a witness. The declination memorandum asserts the tapes will be admissible only to the extent state laws where CISNEROS was located would allow for admissibility.

The ACC's office states their analysis of the conversations on the tapes impress them with the statements CISNEROS made indicating he is paying his taxes. They assert the tape in which CISNEROS is explaining how the money gets to Medlar before it gets to the system only means that there were payments to Medlar and in no way suggests the money was not reported for tax purposes, or not part of the accountant's information.

The single statement CISNEROS made, which says anything about the money being his and that he paid taxes on it, is in the context of explaining the conversation he had with Senator Reagal concerning the Medlar payments, 1/21/93 [REDACTED]. In this regard, CISNEROS had already lied to the FBI and concocted a story he wanted Medlar to go along with. His conversations with a senator who had the power to influence whether CISNEROS would be confirmed or not are self serving and in no way indicate the truth. He did not tell Medlar he paid his taxes. He told Medlar that he had told Senator Reagal he had paid his taxes. There is a big difference and the tape does not serve as exculpatory material.

The use of the surreptitiously recorded conversations has been considered in depth. Medlar has been cooperative in the investigation of this tax case. Medlar has already made statements explaining the tapes, and she will testify either voluntarily or by being compelled to testify. Whether or not Medlar was ever advised to seek immunity by her attorney in no way suggests that she would be unavailable as a witness. We have no reason to believe that Medlar will not appear as a witness.

The Office of Independent Counsel has informed the agents that the tapes have been analyzed, and after extensive research, they have determined the tapes to be admissible in Federal courts. No specifics about the results of the analysis were made available to CID. However, we have been told that they

Assistant Commissioner (Criminal Investigation)
National Office

have authenticated the voices and that the conversations were not spliced together.

We have also consulted with an Assistant US Attorney in the Western District of Texas and have been advised that these tapes will be admissible in federal court despite the fact that they may have been made in violation of the law in some states. As long as the monitoring is allowed under federal statutes, then it may be used as evidence in federal court.

The conversations between CISNEROS and Medlar consistently show CISNEROS' knowledge and intent to hide the money and prevent his accountants from knowing about the payments, and to keep the money out of the system which existed to cause income to be properly recorded.

Hernandez as a Witness

The ACC implied Hernandez is incompetent and is a grudge bearing man who was out to get CISNEROS. However, the evidence in all the interviews conducted with Hernandez indicates he did the best he could with the cooperation he got from CISNEROS. There has never been any suggestion during the course of this investigation that Hernandez currently, or in the years as CISNEROS' accountant, holds a grudge against CISNEROS. If he holds a grudge, he could have made many damaging statements during the interviews to cause CISNEROS trouble. But, the opposite occurred, he was reluctant to even believe CISNEROS was not depositing all income when the agents pointed this out to him. Finally, if he holds that much of a grudge against Cisneros, why would he have given an affidavit to Cisneros' defense counsel claiming responsibility for the SEP deduction?

Character Evidence

The ACC's office contends the character testimony by many "dignitaries" will be harmful to the possibility of conviction. Cisneros may very well be able to produce numerous "dignitaries" to cite his alleged high moral character. However, their testimony may be restricted and the court will probably limit the number of such witnesses. What will also come out during the trial will be the extra-marital affair, the circumvention of the recordkeeping system, six figure understatements of income, concealment of significant facts from the accountants and outright lies to the FBI and the Presidential transition team.

Assistant Commissioner (Criminal Investigation) [REDACTED]
National Office

Alleged Disclosure Violations

The ACC's office also claims concern with apparent disclosure violations in this case. It is important to note that all disclosures made in this case to Independent Counsel were made under the direction and counsel of the District Disclosure Officer. As soon as a technical mistake was discovered, it was corrected as recommended by Assistant Chief Counsel, Disclosure Litigation in the National Office. The issue was also reported to Inspection in Austin, who advised that no willfulness, or criminal intent, or actions existed to cause a need for investigation. This issue is separate from the consideration of whether there is evidence to prove the elements of the tax crime (Attachment 13, Memo 2/24/97). ACC, in fact, acknowledges that this issue will not lead to dismissal of charges or suppression of evidence.

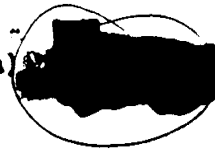
Witness Testimony

Initially, Mr. Finkelstein indicated he strongly believed the witnesses should be brought before a grand jury to solidify their testimony. In the declination memorandum, he reverses his view, now stating, "There is no reason to believe that the witnesses will change their testimony."

We believe there is direct evidence to the contrary. The ACC's office cites a defense counsel obtained affidavit from Hernandez, dated February 7, 1997. Hernandez had previously made a statement that is in direct conflict with this newly obtained affidavit. It has been IRS-CID's observation that Defense Counsel's presence at nearly every witness interview has influenced the witnesses' statements. In addition, several pertinent witnesses who remained employed by CISNEROS had stated they felt compelled to allow Defense Counsel to be present during the interviews.

Even with Defense Counsel present, the pertinent witnesses have furnished sufficient testimony which, when coupled with the documentary evidence, make out a *prima facie* case against CISNEROS. Before the grand jury, and in the absence of CISNEROS' hired counsel, these and other witnesses will be even more candid and forthcoming with information about CISNEROS' crimes.

Assistant Commissioner (Criminal Investigation)
National Office



CONCLUSION

This is a simple case that the defense counsel and Assistant Chief Counsel (Criminal Tax) have convoluted and tried to make complex. All CISNEROS had to do was deposit all his income and let the accountants have the bank statements and do their job. Instead, CISNEROS lied to Hernandez, lied to Gonzalez, lied to the IRS, lied to the FBI, and lied to the Presidential transition team. CISNEROS was in full control of his own financial affairs. His employees only acted when directed by him.

CISNEROS chose his actions. He knew he was earning a substantially greater amount of income than he reported. In 1991, he changed the system and never told his return preparer. That is concealment. He continued his concealment throughout 1992. His words recorded in late 1992 and early 1993 reveal he had been thinking of his taxes when he was acting in prior years.

This is not a case that hinges on one witness, one mistress, one employee, or one accountant. It is not a case about timing of income or taking a few checks. It is about a man who concealed a substantial amount of income from his accountants, concealed where his largest single cash expenditures were going, and then lied to cover his past and his actions. Willfulness can be inferred from one's conduct. CISNEROS has lied, concealed, obfuscated, acted without justifiable purpose, and chosen conduct which would likely cause people to be misled.

In conclusion, the analysis of this case and the conclusions drawn by Assistant Chief Counsel (Criminal Tax) are just plain wrong. The evidence in this case clearly proves CISNEROS knowingly and willfully signed and filed false and fraudulent income tax returns for each of the years 1991, 1992, and 1993, in violation of Title 26, United States Code, Section 7206(1).

John J. Filan

John J. Filan

United States Court of Appeals
District of Columbia Circuit

FILED JAN 16 2002

Special Division

Division for the Purpose of
Appointing Independent Counsels
Ethics in Government Act of 1978, As Amended

Division No. 95-1

IN RE: HENRY G. CISNEROS

Before: SENTELLE, *Presiding*, FAY and CUDAHY, *Senior Circuit Judges*

UNDER SEAL

ORDER

This matter comes before the court upon an application by the Office of Independent Counsel ("OIC") requesting that we refer to the OIC for investigation and possible prosecution a matter purportedly related to its prosecutorial jurisdiction. For the reasons stated in the accompanying memorandum opinion, it is hereby

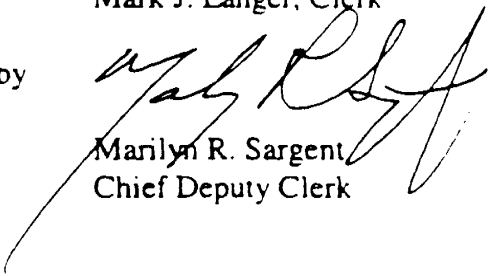
ORDERED that the application be denied.

Per Curiam

For the Court:

Mark J. Langer, Clerk

by


Marilyn R. Sargent
Chief Deputy Clerk

United States Court of Appeals
District of Columbia Circuit

FILED JAN 16 2002

Special Division

Division for the Purpose of
Appointing Independent Counsels
Ethics in Government Act of 1978, As Amended

Division No. 95-1

IN RE: HENRY G. CISNEROS

Before: SENTELLE, *Presiding*, FAY and CUDAHY, *Senior Circuit Judges*

UNDER SEAL

MEMORANDUM OPINION

Opinion of the Special Division filed *PER CURIAM*.

PER CURIAM: The Office of Independent Counsel ("OIC") has filed an application requesting that, pursuant to § 594(e) of the Ethics in Government Act of 1978, as amended, 28 U.S.C. §§ 591-599 (1994) ("the Act"), we refer to the OIC for investigation and possible prosecution a matter purportedly related to its prosecutorial jurisdiction. Apparently, the OIC claims that it "has developed evidence of a sustained effort . . . to ward off or limit the Independent Counsel investigation of Cisneros." Although the Act has expired, *see* § 599, the OIC argues that since the sunset provision makes an exception for continuance of independent counsel investigations "with respect to then pending matters before an independent counsel," and since the referral request encompasses matters already within the OIC's prosecutorial jurisdiction and is only an interpretation of that jurisdiction, *see In re Espy*, 80 F.3d 501, 507 (D.C. Cir., Spec. Div., 1996), then the referral may be considered a "pending matter" not subject to the

sunset provision and one which can therefore be referred by us to the OIC. We disagree.

The Supreme Court has emphasized “that the Special Division has *no* authority to take any action or undertake any duties that are not specifically authorized by the Act.” *Morrison v. Olson*, 487 U.S. 654, 684 (1987) (emphasis in original). Pursuant to § 599, the Act “cease[d] to be effective” on June 30, 1999. Consequently, we have no authority under the Act to grant the OIC’s request.

We do not agree with the OIC that we may nevertheless continue to refer matters under the statute because “any matter that this Court may properly refer under 28 U.S.C. § 594(e) . . . is certainly a ‘pending matter’ under § 599.” It would not appear logical for “the court to refer to the independent counsel [a] matter[] related to the independent counsel’s prosecutorial jurisdiction,” § 594(e), and also for that matter to be considered as one of that independent counsel’s “pending matters” before the referral was made. If it was indeed a “pending matter” then it would not need to be referred.

Furthermore, the exception to the Act’s sunset provision cited to by the OIC was made only for “*then* pending matters before an independent counsel.” (Emphasis added.) On November 30, 2001, two years and five months after the Act’s expiration, the OIC filed its referral request with us. We do not perceive, and the OIC does not explain, how these essentially new allegations may be considered as “pending” before the OIC almost two and one-half years ago and are only now being requested as a referral.

For the reasons stated above, the application by the OIC for referral of a related matter is denied.

UNDER SEAL

United States Court of Appeals
District of Columbia Circuit

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 3 2002

Division for the Purpose of
Appointing Independent Counsels
Ethics in Government Act of 1978, As Amended

Special Division

Division No. 95-1
IN RE: HENRY G. CISNEROS

Before: SENTELLE, *Presiding*, FAY and CUDAHY, *Senior Circuit Judges*

UNDER SEAL
ORDER

Pursuant to the Independent Counsel Reauthorization Act of 1994, 28 U.S.C. § 591-99

1994), the Court, on its own motion and after due consideration of the response of the independent counsel to the order to show cause why the office should not be terminated, concludes that termination of the office of the independent counsel in the above-captioned matter is not currently appropriate under the standards set forth in 28 U.S.C. § 596 (b)(2) for reasons more fully set forth in the memorandum filed simultaneously herewith.*

It is further ordered, that within six (6) months of the date of this order, the Independent Counsel again show cause why his office should not be terminated, and that his response to this show cause order include new developments since the date of this order.

Per Curiam

For the Court:

Mark J. Langer, Clerk

by

Marilyn R. Sargent, Chief Deputy Clerk

*Separate concurring opinion filed by *Senior Circuit Judge Cudahy*.

MEMORANDUM

In May of 1995 this Court appointed David Barrett independent counsel to conduct an investigation into possible federal criminal conduct on the part of HUD Secretary Henry Cisneros. Although the case against Cisneros was disposed of in September of 1999, and although the IC statute expired in June of 1999, IC Barrett's investigation has continued.

Section 596(b)(2) of the IC statute states:

The division of the court, either on its own motion or upon the request of the Attorney General, may terminate an office of independent counsel at any time, on the ground that the investigation of all matters within the prosecutorial jurisdiction of such independent counsel or accepted by such independent counsel under section 594(e), and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions

This section also requires that the court determine on a yearly basis (beginning with the fifth anniversary of the IC's appointment), and on its own motion, whether termination of the IC's office is appropriate. In furtherance of this statutory mandate, on June 21, 2002, the court issued a show cause order directing that IC Barrett "show cause . . . why the Court should not order that any remaining investigations and prosecutions be transferred to the Department of Justice, and the Office of Independent Counsel terminated . . ."

On July 10, 2002, the IC filed his response. In this response, he asserts that his office "is presently investigating . . . possible obstruction of justice by employees of the Department of Justice and the Internal Revenue Service . . ." Apparently, during his initial investigation of Cisneros the IC discovered alleged improprieties with respect to Cisneros' tax returns. He subsequently sought an expansion of his jurisdiction to include investigation of possible tax offenses by Cisneros for the years 1989, 1991, 1992, and 1993. The Attorney General, however,

only expanded the IC's jurisdiction to include possible tax offenses for the year 1992. The IC claims that despite the IRS's internal determination that there was substantial evidence of Cisneros' tax offenses, "[t]here was an inexplicable disconnect between what the IRS uncovered in its investigation of Cisneros and the Attorney General's determination not to grant OIC jurisdiction over tax matters, except for one year." According to the IC, "[t]he evidence thus reveals the disturbing likelihood that the Attorney General was misinformed, directly by Public Integrity and indirectly by the IRS, when she was considering the scope of [the IC's] original and expansion jurisdiction."

Because of this continuing investigation, the IC contends that the special division does not have the authority to terminate his office. He argues that "[t]he determination of when to end criminal investigation or prosecution is a quintessential exercise of prosecutorial discretion," and that "[t]his Court is not authorized to use the termination power [under § 596(b)(2)] to intrude on an independent counsel's prosecutorial discretion to pursue an investigation as his judgment dictates." The IC cites *Morrison v. Olson*, 487 U.S. 654 (1988), in which the Court noted that "[t]he termination provisions of the Act do not give the Special Division anything approaching the power to *remove* the counsel while an investigation or court proceeding is still underway—this power is vested solely in the Attorney General." *Id.* at 682. (emphasis in original.)

The IC also points out that in its discussion of § 596(b)(2), the Court in *Morrison* adopted a very limited scope of the special division's termination power, stating that "the power to terminate, especially when exercised by the Division on its own motion, is 'administrative' to the extent that it requires the Special Division to monitor the progress of the independent counsel and come to a decision as to whether the counsel's job is 'completed.'" The IC states that his

investigation is far from being completed in that his office "is presently investigating substantial and credible evidence of obstruction of justice, false statements, and dereliction of duty by high-ranking government officials in, at a minimum, DOJ and the IRS, with the purpose and effect of obstructing this Office's investigation of Henry Cisneros." While we are not without misgivings, we ultimately agree that termination of the office is beyond the power of the Court on the present record.

It is true that section 596 (b)(2) gives the special division authority to "terminate an office of independent counsel at any time," under specified conditions. Furthermore, this section mandates that the court, at specified intervals, make a determination whether or not termination is appropriate. The Supreme Court, after expressing the above-quoted observations concerning the limitations on the special division's removal authority, went on in *Morrison* to note that termination pursuant to section 596(b)(2) "is basically a device for removing from the public payroll an independent counsel who has served his or her purpose, but is unwilling to acknowledge the fact." *Id.* at 683. One way to view our present task is that we are seeking to determine whether the independent counsel in this matter fits that description. His jurisdiction in this matter derives from the original appointment order and one expansion order. The core of the jurisdiction of the appointment order on May 24, 1995, gave the IC authority to investigate whether Cisneros "committed a violation of any federal criminal law . . . by making false statements with respect to his past payments to Linda Medlar to the Federal Bureau of Investigation during the course of his background investigation or conspiring with others to do so." And the order of March 18, 1997, expanded the IC's jurisdiction to the extent of granting him authority to investigate whether Cisneros "committed a violation of federal criminal law . . .

arising from or relating to the filing or preparation of his federal income tax returns for tax year 1992 or conspiring with others to do so."

In late 1997 a grand jury indicted Cisneros on charges of conspiracy, making false statements, and obstruction of justice; the IC declined to pursue any charges relating to Cisneros' 1992 tax return. On September 7, 1999, Cisneros pled guilty to a single misdemeanor count of lying to the FBI. In return for Cisneros' guilty plea, the IC dismissed all 18 felony counts that had originally been lodged against him. Cisneros was subsequently sentenced to pay a fine of \$10,000 and a \$25 special assessment, but was not sentenced to any time in prison or on probation. (Charges were dismissed against all the other defendants except for Linda Medlar, who pled guilty to bank fraud, money laundering, obstruction of justice, falsifying material facts, and making false statements.) Therefore, the heart of the investigation in this matter is over, and has been over for three years.

The IC nevertheless claims that the activities he is currently pursuing are within his prosecutorial jurisdiction because they are related to the original subject matter he was authorized to investigate and they were developed during and arose out of that investigation. Even assuming, *arguendo*, that the IC is correct, those activities appear to be issues upon which the Attorney General made her determinations, and it may arguably be more appropriate for the DOJ to conduct its own investigation. Again, section 596(b)(2) states that termination by the special division is allowable if "the investigation . . . and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions." It could be argued that with the case against Cisneros resolved, the investigation has been "so substantially completed that it would be

appropriate for the Department of Justice to complete" the investigation because the remaining matter under investigation concerns DOJ internal policy decision-making appropriate for investigation by the DOJ itself.

Furthermore, the IC statute expired over three years ago. By allowing the statute to "sunset," Congress expressed its intention that criminal investigations, even of government officials are within the province of the Executive and not of independent counsels appointed by the Court. However, the independent counsel retains jurisdiction of the matters under investigation under the grandfather provision of section 599 of the Act which states that "[t]his chapter shall cease to be effective [on June 30, 1999], *except* that this chapter shall continue in effect with respect to then pending matters before an independent counsel.") (emphasis supplied).

herefore, the independent counsel and the Court remain subject to the provisions of the Ethics in Government Act as fully as if the sunset provision had not been allowed to have its effect.

That said, we are bound by the constitutional rule interpreted and applied in *Morrison v. Olson*.

As an Article III Court, we are not empowered to supervise the independent counsel, lest the Court find itself performing "executive or administrative duties of a nonjudicial nature."

Morrison v. Olson, 487 U.S. at 680. Given the "narrow construction" which the Supreme Court applied to "save [the statute] from constitutional infirmities," *id.* at 682, we cannot order the office terminated on the present record. However, because of the unique status of this investigation, and especially because of the termination of the act, we expect that this matter will be brought to a close in the foreseeable future. We are, therefore, ordering an updated response to the show cause order including any new developments six months from the date of this order, including specifically what, if any, indictments have been returned.

CUDAHY, *Circuit Judge*, concurring:

The majority has accurately described the problem before us. JC Barrett has skillfully marshaled the constitutional arguments why in theory, and perhaps in practice, an independent counsel might pursue his investigation forever, if he were so inclined. At least, he need have little fear of being called to a halt by this panel of judges. Last year, at about this time, after this problem had received its annual round of consideration, I filed a separate opinion, which in tone and outcome reads much like today's panel memorandum. See *In re Cisneros*, 255 F.3d 832, 832 (D.C. Cir., Spec. Div., 2001) (Cudahy, J., concurring). I mention this, not out of pride of authorship, but to illustrate that there is nothing new about the problem with which we are trying to deal.

Mr. Barrett reports that he began to detect foul play by the higher-ups in Justice and in the IRS in 1997. That is five years ago, but apparently five years has not been long enough to determine whether there is something solid there or not. As the majority observes, the Supreme Court has suggested that termination pursuant to section 596(b)(2) is "basically a device for removing from the public payroll an independent counsel who has served his or her purpose but is unwilling to acknowledge the fact." *Morrison v. Olson*, 487 U.S. 654, 683 (1988). It might be convenient if that standard could be applied to the present circumstances, but, as the majority suggests, things are not that simple. There are, of course, the constitutional concerns, noted in *Morrison*, that caution us against undue aggressiveness. But it is certainly not too early to consider the possibility that the *Cisneros* investigation has fallen into the unfortunate category described in *Morrison*.

So, does this unfortunate category described above in *Morrison* now fit the *Cisneros*

investigation? It is noteworthy that the Court's rationale in *Morrison* essentially tracks the reasoning contained in the legislative history that accompanied the original version of the Act. *See* S.Rep. 95-170, at 75 (1977), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4291 (stating that the termination provision "provides for the unlikely situation where a special prosecutor may try to remain as special prosecutor after his responsibilities under this chapter are completed").

Further, the 1994 amendments to the Act added explicit statutory language requiring that this court make an affirmative determination at specific intervals whether an investigation was substantially complete. *See* 28 U.S.C. § 596(b)(2). The legislative history accompanying the 1994 amendments quoted the same passage from *Morrison* and acknowledged "the constitutionally-defined limits of the special court's authority under section 596(b)(2)." S. Rep. 3-101, at 33-34 (1993), *reprinted in* 1994 U.S.C.C.A.N. 748, 778-79. The report then stated that the amendment "seeks to ensure that the court exercise that authority on a periodic basis."

Id. While we might not relish the task of deciding when it is constitutionally permissible for this court to terminate an investigation, that is the role that has been assigned to us by Congress. As I have noted on an earlier occasion, an overly passive approach by our court "renders the termination provisions of the Independent Counsel Act, 28 U.S.C. § 596(b)(2), a dead letter." *In re Madison Guar.Sav. & Loan Ass'n*, 187 F.3d 7652, 653 (D.C. Cir., Spec. Div., 1999) (Cudahy, J., dissenting).

To my mind the key date in this matter seems to be June 30, 1999 – more than three years ago – which is the date when the sun definitively set on the Ethics in Government Act. *See* 28 U.S.C. § 599. Although this statute also included provisions extending jurisdiction over investigations pending at the time of its expiration, it seems to be implicit in this extension that

Such matters be brought to a reasonably prompt conclusion. That could be accomplished here if the Department of Justice took over the probe, conceivably by the Attorney General's naming Mr. Barrett himself as a special prosecutor. This might be the way to go if, as Mr. Barrett suggests, the Justice Department would have difficulty investigating itself.

The Attorney General has statutory authority to appoint special prosecutors. *See, e.g.*, 28 U.S.C. § 515 ("Any attorney specially appointed by the Attorney General . . . may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings . . . which United States attorneys are authorized by law to conduct . . ."); 28 U.S.C. § 533 ("The Attorney General may appoint officials . . . to detect and prosecute crimes against the United States . . . [and] to conduct such other investigations

arding official matters under the control of the Department of Justice . . . as may be directed by the Attorney General."); *see also United States v. Nixon*, 418 U.S. 683, 694 & n.8 (1974) (summarizing statutory and regulatory basis that permitted the Attorney General to delegate his authority to a "Special Prosecutor"); *In re Sealed Case*, 829 F.2d 50, 55 (D.C. Cir. 1987) (discussing statutory and regulatory authority "authoriz[ing] the Attorney General to create an Office of Independent Counsel virtually free of ongoing supervision"). Of course, this all assumes that there is something to investigate, and the Attorney General could make this call.

As a more promising alternative, we might move at this time to set a date for termination, which is an action specifically mentioned in the original legislative history of the Ethics in Government Act. *See* S. Rep. 95-170, at 75 (1977), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4291 (noting that in order to facilitate an orderly termination decision under the Act, "it may be necessary for the division of the court to set a date certain for the termination of the office of

special prosecutor a reasonable time in the future so that the special prosecutor has an opportunity to complete this report while still serving as special prosecutor"). This approach seeks to find some middle ground between the constitutional strictures against supervision and the consequences of the expiration of the Act. Setting a termination date would also require this court to confront any doubts that may arise about whether Mr. Barrett is still within his prosecutorial jurisdiction.

Of course, we know that the matter most centrally within his jurisdiction, namely the plea bargain with Mr. Cisneros, was completed three years ago. We also know that his investigatory activities have been costing about \$1,000,000 every six months and thus have amounted to more than \$16,000,000 to date. I think the setting of a date for termination, perhaps in consultation with Mr. Barrett, offers the best prospect of carrying out the mandate of the statute without violating the injunctions of the Supreme Court.

I construe what the Special Division is doing here to be in important respects the functional equivalent of setting a date for termination. We appear to be saying that, at six-month intervals, we will reconsider the issue of termination. On that basis, I join in the Order and Memorandum of the court.

